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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PENNSYLVANIA NURSES ASSOCIATION,

Petitioner,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, *et. al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts state common law tort claims filed by one labor union against another for intentional, malicious, and outrageous conduct that caused substantial economic damages which the National Labor Relations Board does not have the authority to remedy, simply because the conduct was arguably prohibited by the National Labor Relations Act?

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Pennsylvania Nurses Association [hereinafter "PNA"] hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Third Circuit held that PNA's state common law claims alleging fraud, deceit, commercial disparagement, unfair competition, vicarious liability, intentional interference with present and prospective contractual relations, aiding and abetting, and conspiracy against PNA's former employees, their new employer (a competing labor union), and their new employer's agents, for conduct which caused PNA more than one million dollars in economic damages, were within the exclusive jurisdiction of the National Labor Relations Board and were therefore preempted by the National Labor Relations Act.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 90 F.3d 797 (3d Cir. 1996). (App. A-1). The opinion of the United States District Court for the Middle District of Pennsylvania is not reported. (App. A-37).

STATEMENT OF JURISDICTION

The Third Circuit entered judgment on July 25, 1996 (App. A-55). PNA filed a timely Petition for Rehearing *en banc*, which was denied on August 26, 1996. (App. A-56). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case would require this Court to analyze the preemptive scope of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*[hereinafter "NLRA"]. The relevant provisions of the NLRA are as follows:

[Section 7] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities....

29 U.S.C. § 157.

[Section 8(b)(1)(A)] It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7....

29 U.S.C. § 158(b)(1)(A).

[Section 9] Whenever a petition shall have been filed, in accordance with such regulations as may be described by the [National Labor Relations] Board --

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and their employer declines to recognize their representative...or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative...; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative...; the [National Labor Relations] Board shall

> investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice....If the [National Labor Relations] Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c).

STATEMENT OF THE CASE

A. *Petitioner's Background and Factual Allegations*

Petitioner PNA is both a professional association and labor union for registered nurses. Prior to June 30, 1993, PNA represented over nine thousand nurses in collective-bargaining at sixty local units throughout the Commonwealth of Pennsylvania and Delaware. At that time, Respondents Debra Ferguson, Richard Lewis, Jeffrey Lewis, and Karen Schrader were *employed* by PNA as labor representatives. These individuals were responsible for organizing local bargaining unit employees (nurses) on behalf of PNA, negotiating collective-bargaining agreements between PNA and various health care facilities, administering and enforcing collective-bargaining agreements, cultivating and maintaining a sound working relationship between PNA and its local units, and keeping PNA apprised of all local unit activities (including any attempt by a competitor union to organize the nurses represented by PNA). As employees of PNA, these individuals had a legal duty under Pennsylvania common law to act honestly, in good faith, and in the best interests of PNA.

By mid-1993, the above-named labor representatives decided that they no longer wanted to be employed by PNA

and concluded that their chances of securing employment with a competitor union would be increased if they could bring with them PNA's business, i.e., the local units they were servicing on behalf of PNA.

One of the labor representatives, Mrs. Ferguson, had developed an interest in becoming employed by Respondent Pennsylvania State Education Association [hereinafter "PSEA"]. PSEA is a labor union which, at that time, exclusively represented school employees. Mrs. Ferguson was familiar with PSEA because her husband, Respondent Thomas Ferguson, was employed by PSEA as a labor representative.

In order to guarantee herself employment with PSEA, Mrs. Ferguson offered to deliver to PSEA as many of PNA's local units as she could. To that end, Mrs. Ferguson, along with her husband and Respondent Alfred Nelson, Jr. (PSEA's Director of Organizing and Media Relations), developed a scheme to enlist the assistance of the other above-named PNA labor representatives to divert local units away from PNA and toward PSEA. It was also agreed that Mrs. Ferguson, Richard Lewis, Jeffrey Lewis, and Karen Schrader would be formally employed by PSEA, and act as labor representatives to the former PNA local units after the units affiliated with PSEA.

To accomplish the objectives of this unlawful conspiracy, Mrs. Ferguson and the other labor representatives--*while still in the employ of PNA, and with the assistance and encouragement of PSEA and Mr. Ferguson and Mr. Nelson*--tricked PNA into believing that they were working on its behalf while actually promoting the interests of PSEA. For example, the labor representatives actively solicited nurses to switch their allegiance from PNA to PSEA. Also, the labor representatives led PNA to believe that they were faithfully protecting its interests as exclusive bargaining representative

for the local units by negotiating renewal collective-bargaining agreements between PNA and the various health care facilities, when, in fact, the labor representatives purposefully failed to negotiate in good faith so as to let the agreements expire, thereby giving PSEA a chance to seek representation of the units. To prevent PNA from becoming suspicious, the labor representatives lied to PNA about collective-bargaining agreement expiration dates and deliberately failed to notify PNA of PSEA's desire to represent the local units.

Also unbeknownst to PNA, the labor representatives and other Respondents disparaged PNA's reputation and the reputation of its leadership to the nurses whom PNA represented, including making and promulgating false, malicious, and defamatory statements about PNA. Respondents even went so far as to distribute a false report stating that PNA and its officials had been criminally indicted by the federal government.

All of the above actions were undertaken for the express purpose of crippling and destroying PNA. Moreover, many were accomplished by using PNA's proprietary information such as confidential membership lists stolen from PNA by PNA's own labor representatives.

By the time this case was filed, PSEA's new "health care division" was fully operational, and Mrs. Ferguson and the other labor representatives were servicing former PNA local units on behalf of their new employer, PSEA. PNA filed this case, not to regain any of the local units it lost as a result of Respondents' tortious activity, but rather: (1) to enforce the common law rights given to it as an employer doing business in Pennsylvania to be free from, *inter alia*, unlawful business conspiracies, defamatory statements, commercial disparagement, unfair competition, breaches of fiduciary duties, fraud, and deceit; and (2) to recover the more than

$1,300,000 in actual damages PNA sustained as a result of Respondents' unlawful conduct.

B. *Procedural History*

This case was originally filed in Pennsylvania state court where PNA sought compensatory and punitive damages. On June 6, 1994, Respondents removed this case to the United States District Court for the Middle District of Pennsylvania, and, on March 28, 1995, moved for judgment on the pleadings. In their motion, Respondents contended that PNA's state law claims were preempted by the NLRA.

On July 28, 1995, the District Court held that the following claims were preempted by the NLRA:

Count II (fraud and deceit);

Count IV (commercial disparagement);

Count V (unfair competition);

Count VI (vicarious liability);

Count VII (interference with present contractual relations--the employment contracts between PNA and its labor representatives);

Count VIII (interference with present and prospective contractual relations--the contracts between PNA and its local units);

Count IX (interference with present and prospective contractual relations--the collective bargaining agreements between PNA and various health care facilities);

Count X (aiding and abetting); and

Count XI (conspiracy).[1]

(App. A-54).

On July 25, 1996, a three judge panel of the United States Court of Appeals for the Third Circuit affirmed the District Court's decision.[2] The Third Circuit's opinion is discussed below.

C. *The Third Circuit's Opinion*

The Third Circuit began its analysis by summarizing the framework for determining whether state common law claims are preempted by the NLRA:

> [S]tate regulation and causes of action are presumptively preempted if they concern conduct that is *actually or arguably either prohibited or protected by the* [*NLRA*]. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches

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[1] Respondents argued that Count I (breach of contract) was preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that Count III (defamation) was preempted by the NLRA. The District Court held that both Counts were not preempted. (App. A-54). Inasmuch as the Third Circuit affirmed the District Court's decision with respect to Counts I and III, those Counts are not implicated in the instant Petition.

[2] Circuit Judge Rosenn concurred in the Third Circuit's opinion that Counts VIII and IX were preempted, but dissented from the Court's opinion that Counts II, IV, V, VI, VII, X, and XI were preempted. (App. A-36).

> interests deeply rooted in local feeling and responsibility. In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the [NLRA], and the risk that the State will sanction conduct that the [NLRA] protects.[3]

(App. A-8) (quoting *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983)).

The initial preemption inquiry is whether the conduct at issue is actually or arguably either protected or prohibited by the NLRA. The Third Circuit correctly assumed that Respondents' conduct was neither protected nor arguably protected by the NLRA. (App. A-8). However, the Third Circuit concluded that the conduct attributed to Respondents in Counts II, IV, V, VI, VII, VIII, IX, X, and XI of PNA's Complaint was arguably prohibited by § 8(b)(1)(A) and § 9 of the NLRA because the conduct arguably restrained or coerced the nurses in their selection of a labor union. (App. A-9).

However, as this Court has repeatedly held, and as the Third Circuit acknowledged, state law claims are not automatically preempted when the conduct underlying the claim is arguably prohibited by the NLRA. If the conduct is only of "peripheral concern" to the NLRA, or "touches interests deeply rooted in local feeling and responsibility," the interests of the state in controlling and remedying the conduct

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[3] This analytical framework was first articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959), and is commonly referred to as the "*Garmon* preemption doctrine."

must be balanced against the risk of interference with the NLRB's authority to adjudicate controversies committed to it by the NLRA. (App. A-11).

Accordingly, the Third Circuit set out to ascertain whether there would be a risk of interference with the NLRB's jurisdiction if PNA's state law claims were permitted to proceed in state court. In doing so, the Third Circuit relied on this Court's seminal case, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), and quoted it as follows:

> The critical inquiry...is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to...or different from...that which could have been presented to the [NLRB]. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the [NLRB] which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

(App.A-13) (quoting *Sears*, 436 U.S. at 197).

This inquiry is commonly called the *Sears* "identical controversy test." Although the Third Circuit was correct in invoking the test, the Court failed to follow it, and instead reformulated the test and applied it as follows.

The Third Circuit surmised that the tortious conduct underlying PNA's state law claims was the same conduct that would form the basis of an unfair labor practice proceeding before the NLRB--namely, allegations that Respondents attempted to undermine PNA while at the same time influence

the nurses' choice of a collective-bargaining representative. Because the Third Circuit believed that these factual allegations would be common to both the state court and NLRB proceedings, it concluded that there was a real risk of interference with the NLRB's jurisdiction and held that Counts II, IV, V, VI, VII, VIII, IX, X, and XI of PNA's Complaint were preempted. (App. A-15).

In a vigorous dissent, Circuit Judge Rosenn disagreed with the majority that Counts II, IV, V, VI, VII, X, and XI were preempted, and objected to the majority's treatment of the *Sears* "identical controversy test." (App. A-32).

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION ESTABLISHES A DIRECT CONFLICT WITH PREEMPTION DECISIONS OF THIS COURT AND UNDERMINES RELEVANT PRINCIPLES OF FEDERALISM.

A. *The Third Circuit's Reformulation of the Sears "Identical Controversy Test" Irreconcilably Conflicts with Preemption Decisions of this Court*

In *Sears*, this Court distilled its prior preemption jurisprudence and provided a useful analytical test for courts to apply when determining whether state law claims are preempted in circumstances where the claims are based on conduct which is neither protected nor arguably protected by the NLRA, but which may be prohibited or arguably prohibited by the NLRA. If the conduct underlying the state law claim is only of "peripheral concern" to the NLRA, or "touches interests deeply rooted in local feeling and responsibility," the interests of the state in controlling and remedying the conduct must be balanced against the risk of interference with the NLRB's authority to adjudicate

controversies entrusted to its exclusive jurisdiction by the NLRA.

Sears holds that in determining whether the risk of interference outweighs the state's interests, the key inquiry or test is whether the *controversy* presented in court is "identical to" or "different from" the *controversy* that could have been (but was not) presented to the NLRB. Where the controversies are determined to be identical, the state law claim is preempted and the NLRB then has the exclusive jurisdiction to adjudicate the controversy. Where the controversies are determined to be different, however, the state law claim is not preempted and may proceed in court. Preemption, in short, hinges on whether the controversies are identical or different.

To that end, the "identical controversy test" requires that four separate and distinct questions be addressed: (1) whether the factual basis of each controversy is identical; (2) whether the interests to be protected in each controversy are identical; (3) whether the remedies available in each controversy are identical; and (4) whether the remedies available to the NLRB are reasonably effective in controlling and remedying the conduct. The purpose of these questions is to determine whether the controversies are, in fact, identical, thereby warranting exclusive NLRB jurisdiction. For only when the controversies are identical does the risk of interference with the NLRB's jurisdiction outweigh the state's interest in controlling and remedying tortious conduct. In order to guarantee that both state and federal interests are respected, this Court, in its preemption cases, has consistently addressed all four questions.

In this case, however, the Third Circuit refused to address all four questions, but concentrated exclusively on the first. Specifically, the Third Circuit held that the controversy presented by PNA's state law claims was identical to the

controversy that PNA could have presented to the NLRB simply because the two proceedings shared a common factual basis. (App. A-15). In doing so, the Third Circuit disregarded the preemption decisions of this Court, reformulated the *Sears* "identical controversy test" into a simplistic bright-line test, devalued the states' interests, and generated confusion on this important issue.

Perhaps as an explanation for its divergence, the Third Circuit noted that preemption decisions of this Court "have been somewhat unclear." (App.A-16). Notwithstanding the merits of such a statement, however, what *is* clear is that the Third Circuit's narrow reformulation of the *Sears* "identical controversy test"directly conflicts with those decisions. As the following demonstrates, this Court has repeatedly emphasized the importance of considering more than whether the factual basis of each controversy is identical in determining whether a state law claim is preempted by the NLRA.

In some cases (*Garner v. Teamsters Union*, 346 U.S. 485 (1953) (state law claim based on a labor union's peaceful picketing for an unlawful objective); *Garmon*, *supra* (same); and *Operating Engineers Local 926 v. Jones*, 460 U.S. 669 (1983) (state law claim based on a discriminatory discharge caused by a labor union)), this Court held that the state law claims *were* preempted by the NLRA. In other cases (*United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (state law claim based on intimidation and threats of violence by a labor union); *United Auto Workers v. Russell*, 356 U.S. 634 (1958) (state law claim based on mass picketing by a labor union); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (state law claim based on malicious defamation by a labor union); *Sears*, *supra* (state law claim based on a labor union's peaceful picketing for an

unlawful objective on private property); and *Belknap*, *supra* (state law claim based on an employer's misrepresentations to strike replacements)), this Court held that the state law claims were *not* preempted by the NLRA.

And, in one case, this Court distinguished between two state law claims, holding that one was preempted while the other was not (*Farmer v. United Bhd. of Carpenters*, 430 U.S. 290 (1977) (state law claim based on discriminatory referrals by a union hiring hall was preempted, while a state law claim based on a labor union's personal abuse and harassment of an employee was not preempted)).

Importantly, all of the state law claims in the above cases were based on conduct that shared a common factual basis with the claim (or claims) that could have been brought before the NLRB. Yet this Court did not preempt most, much less all of the claims. In fact, this Court preempted only those state law claims where the underlying conduct was the type of conduct over which the NLRB had particular experience and expertise in adjudicating; where the conduct (in its purpose, manner of execution, and harm caused) did not transcend in egregiousness the type of conduct customarily proscribed by the NLRA; and where the remedies available to the NLRB were reasonably effective in curing the harm. *Garner*, *supra*; *Garmon*, *supra*; *Farmer*, *supra*; and *Jones*, *supra*. In other words, the claims were preempted because the controversy in state court was identical to the controversy that could have been presented to the NLRB.[4]

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[4] Moreover, in *Garmon*, *Farmer*, and *Jones*, permitting the state law claims to proceed risked not only potential but actual interference with the NLRB's jurisdiction. In *Garmon*, Justice Harlan, in a concurring opinion joined by three Justices, concluded that the conduct on which the state law claim was

Exclusive NLRB jurisdiction over these types of claims--where the interests protected and the relief available are nearly identical in state court and the NLRB--is consistent with the intent of Congress to have a centralized forum for the uniform administration of labor law. Allowing these claims to proceed in state court would undoubtedly interfere with the NLRB's exclusive jurisdiction, and cause critical substantive conflicts between the NLRB and the states concerning the lawfulness of conduct about which Congress intended there should be centralized and uniform jurisprudence.

On the other hand, in those cases where the conduct was outrageous and malicious; where the conduct (in its purpose, manner of execution, and harm caused) transcended in egregiousness the type of conduct over which the NLRB normally has exclusive jurisdiction (or where the conduct was only marginally within the range of conduct prohibited by the NLRA); where the state had a significant interest in punishing the conduct and remedying the harm; and where the remedies

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based (peaceful union picketing) was arguably *protected* by the NLRA. Permitting the state claim to proceed could have resulted in a state court decision prohibiting and punishing conduct which the NLRA protected. In *Farmer*, the conduct (discriminatory hiring hall practices by a union) on which the state law claim was based had already been adjudicated by the NLRB for which the NLRB had provided a full and effective remedy. In *Jones*, the NLRB had made a factual determination that the defendant union did not engage in the conduct on which the state law claim was based. Therefore, allowing the state law claim to proceed in court risked actual interference and conflict with the NLRB's previous decision. In addition, this Court also opined that the union's conduct may have been arguably *protected* under the NLRA.

available to the NLRB were not effective in punishing or curing the conduct, this Court held that the state law claims were not preempted. *Laburnum*, *supra*; *Russell*, *supra*; *Linn*, *supra*; *Farmer*, *supra*; *Sears*, *supra*; and *Belknap*, *supra*.

With regard to these cases, it is clear that the interests to be protected and the remedies available in both state court and the NLRB were significantly different. Moreover, the state had the power to control and remedy the conduct, and the NLRB did not. Because the controversies were not identical, this Court determined that the interests of the states outweighed any risk of actual or potential interference with the NLRB's jurisdiction, and that the state law claims could proceed. Had the Third Circuit performed a similar analysis in this case, instead of merely examining the factual basis of each controversy, it would have reached the same result.

In this case, the conduct of which Respondents are being accused was outrageous and malicious; transcended in egregiousness the type of conduct over which the NLRB customarily exercises jurisdiction (thereby obviating the need for centralized, uniform, and exclusive NLRB jurisdiction); was only marginally within the range of conduct which the NLRB has an interest in punishing and remedying; and caused grave harm to PNA which the NLRB does not have the power to remedy, but which the Commonwealth of Pennsylvania does.

Had the Third Circuit followed the teachings of the NLRA preemption decisions of this Court, it would have been forced to conclude that the controversies raised by PNA's state claims were not identical to the controversies that PNA could have raised with the NLRB, and that permitting PNA's state law claims to proceed in court would pose no risk of interference with the NLRB's jurisdiction. The Third Circuit's reformulation of the "identical controversy test"

overstates the federal interest, devalues the Commonwealth of Pennsylvania's interest in protecting its corporate citizens' from tortious and predatory conduct, and leaves its citizens without a remedy.

B. *The Third Circuit's Decision Substitutes a Simplistic Bright-Line Test in Place of the Sears "Identical Controversy Test," Thereby Encouraging Tortious Conduct in Labor Relations and Immunizing Tortfeasors from Liability*

In place of the *Sears* "identical controversy test," the Third Circuit substituted, *sub silentio,* a simplistic bright-line test that holds all state common law claims preempted so long as the claims arise from conduct (except malicious defamation and violence) which constitutes an arguable unfair labor practice and involve one or more labor unions. If the Third Circuit's decision stands, everything else--including the type of conduct, the outrageousness of the conduct, the extent of harm caused by the conduct, the interests of the persons or entities affected by the conduct, the state's interest in prohibiting the conduct, and the power or impotence of the NLRB to punish and remedy the conduct--will be rendered irrelevant.

This new bright-line test will have immediate and grave consequences in any jurisdiction in which the Third Circuit's decision is followed. When the NLRB is deemed to have exclusive jurisdiction over conduct which it is powerless to punish and remedy, while at the same time state courts that do have that power are prohibited from exercising it, the effect will be to ratchet up the level of misconduct by labor unions and employers alike in union organizing drives and, for that matter, in labor relations generally.

The Third Circuit's decision is an open invitation for labor unions and employers to violate the state common law with impunity, because the decision immunizes tortfeasors from all civil liability except NLRB sanctions and remedies which, as in this case, are woefully inadequate to punish the tortfeasor and compensate the victim.

Under the Third Circuit's decision, an unscrupulous employer faced with an unwelcome labor union organizing campaign could bribe the union's own employees to secretly betray the union, misappropriate the union's confidential information, steal the union's money, and undermine the union's attempt to organize workers whom the union sought to represent. Crippled, bankrupt, and beaten, the union would have no civil remedy for the wrongs it endured except to file an unfair labor practice charge with the NLRB. This result is clearly inconsistent with the intent of Congress and the preemption cases of this Court.

In this case, and in any other case involving parties who happen to be labor unions, the Third Circuit has created an impregnable shield behind which any tortfeasor (whether an employer or labor union) can hide to successfully escape punishment for their outrageous conduct. This Court should grant the instant Petition in order to prevent such a public policy disaster.

II. THE THIRD CIRCUIT'S DECISION ESTABLISHES A DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Third Circuit's decision in this case establishes a mature conflict among the circuits concerning the formulation and application of the *Sears* "identical controversy test." This conflict has resulted in a split of authority on the important federal question of the proper scope of NLRA preemption.

Specifically, the Fifth, Seventh, and Ninth Circuits have each held that common law claims similar to PNA's were not preempted because the interests protected and the remedies requested in both the state court and NLRB proceedings were different even though the two proceedings shared a common factual basis. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1427 (7th Cir. 1995) (common law claims for breach of employment agreement, breach of covenant not to compete, and breach of fiduciary duty not preempted by the NLRA because "despite the commonality of some underlying facts...it would not interfere with the NLRB's determination of matters within its scope of expertise to allow [the employer] to pursue its state law claims"); *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1470 (5th Cir. 1993) (claims for fraud and breach of fiduciary duty not preempted because the *Sears* "identical controversy test""require[d] not only looking to the factual bases of each controversy, but also examining the interests protected by each claim and the relief requested"); *Milne Employees Assoc. v. Sun Carriers, Inc.*, 960 F.2d 1401, 1417 (9th Cir. 1991) (various common law tort claims not preempted because "despite the commonality of some underlying facts, allowing the employees to pursue their state law claims [would] not interfere with the [NLRB's] determination of matters within its scope of expertise"); *Windfield v. Groen Div.*, 890 F.2d 764, 768 (5th Cir. 1989) (common law breach of contract, fraud, and promissory estoppel claims not preempted as the *Sears* "identical controversy test" "required a more searching comparison than merely the factual bases of each controversy....The broader inquiry into the controversies...involve[d] an examination of the interests protected by and relief requested for each claim").

Where one circuit has issued a decision in conflict with the decisions of other circuits on an important federal question such as the scope of NLRA preemption and states' rights, this Court should promptly intervene and resolve the inconsistency. *See* U.S. Sup.Ct. R. 10(a). Failure to do so will result in severe practical consequences. For example, had PNA filed an identical case in either the Fifth, Seventh, or Ninth Circuits, none of its state common law claims would be preempted.

Simply put, this Court should grant the instant Petition to establish uniformity among the circuits. Moreover, because of the particularly underhanded and egregious conduct in this case, this case provides this Court with the best opportunity it has had to resolve the scope of NLRA preemption and states' rights.

CONCLUSION

Wherefore, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Filed July 25, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7457

PENNSYLVANIA NURSES ASSOCIATION,
Appellant

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; DEBRA FERGUSON; RICHARD LEWIS; JEFFREY LEWIS; KAREN SCHRADER; ALFRED NELSON, JR.; THOMAS FERGUSON

No. 95-7458

PENNSYLVANIA NURSES ASSOCIATION

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; DEBRA FERGUSON; RICHARD LEWIS; JEFFREY LEWIS; KAREN SCHRADER; ALFRED NELSON, JR.; THOMAS FERGUSON,
Appellants

No. 95-7645

PENNSYLVANIA STATE EDUCATION ASSOCIATION; DEBRA FERGUSON; RICHARD LEWIS; JEFFREY LEWIS; KAREN SCHRADER; ALFRED NELSON, JR.; THOMAS FERGUSON,

Petitioners

v.

PENNSYLVANIA NURSES ASSOCIATION,

Respondent

HONORABLE WILLIAM W. CALDWELL,

Nominal Respondent

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No. 94-cv-00880)

Argued May 20, 1996

Before: SLOVITER, *Chief Judge,*
SAROKIN and ROSENN, *Circuit Judges*

(Opinion Filed July 25, 1996)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

The contesting parties in this case are two labor organizations who vied for the right to represent the nurses at eight health-care facilities in Pennsylvania and Delaware. Pennsylvania Nurses Association (PNA), the organization that had previously been the bargaining agent, filed an action asserting eleven state-law tort claims against the Pennsylvania State Education Association and six individuals associated with it, four of whom had previously been PNA's representatives (collectively referred to as "PSEA"). The district court entered judgment on the pleadings for PSEA

on nine of the claims on the ground that they were preempted by the National Labor Relations Act. It rejected PSEA's contention of preemption on the remaining claims and remanded them to the state court. PNA appeals the district court order to the extent that it entered judgment for PSEA. PSEA, as cross-appellant, appeals from the disposition of the two surviving claims.

I.

PROCEDURAL HISTORY

Because this appeal arises from the district court's grant of a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), we accept as true the well-pleaded allegations in the complaint and draw all inferences therefrom in favor of PNA. *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980). Accordingly, we set forth the facts as PNA alleges them.

PNA is both a professional association of nurses and a nurses' labor union; PSEA is a school employees' labor union. Before June 30, 1993, PNA represented approximately 9,000 nurses through sixty local bargaining units in Pennsylvania and Delaware. During that period, defendants Debra Ferguson, Richard Lewis, Jeffrey Lewis, and Karen Schrader worked for PNA as labor representatives. Sometime thereafter, these representatives decided that they no longer wanted to work for PNA and would be more likely to secure positions with another union if they could bring along with them the local PNA units they represented. Debra Ferguson, in particular, sought a position with PSEA, offering to bring with her as many of PNA's local units as possible. She accordingly developed a plan to work with PSEA to enlist the help of the other defendant PNA representatives in shifting PNA local units and their leadership away from PNA and toward PSEA.

PNA claims that to further the conspiracy that it alleges, PSEA sought authorization from its Board of Directors to allow it to represent nurses as well as teachers; met with the executive and negotiating committees of various PNA local units along with the labor representatives, who were still employees of PNA, to persuade them to disassociate from PNA and join PSEA; provided Debra Ferguson and the other named PNA representatives with PSEA propaganda, election cards, and other materials to aid them in inducing PNA local units to join PSEA; held meetings with PNA local memberships and, with the defendant PNA representatives, spoke in favor of affiliating with PSEA instead of PNA; "produced and promulgated false, malicious, and defamatory propaganda designed to destroy the reputation of PNA," App. at 22; offered employment with PSEA as an incentive to Debra Ferguson and the other defendant labor representatives to assist in affiliating the PNA local units with PSEA; and sought to induce other PNA labor representatives to leave PNA and become PSEA employees and to bring their local PNA units with them.

PNA also contends that the individual defendants who were its former labor representatives failed to negotiate in good faith successor collective bargaining agreements on behalf of their PNA units, which enabled PSEA's subsequent efforts to represent the units after the agreements expired; disparaged the reputation of PNA and its officials to persuade unit members to disassociate from the union; solicited unit members to sign election cards for PSEA representation; and engaged in disloyal activities including the creation and distribution of propaganda promoting PSEA at the expense of PNA.

PNA originally filed its complaint in the Court of Common Pleas of Dauphin County, setting forth the following eleven state-law claims in separate counts against one or more of the defendants: I) breach of fiduciary duty, II) fraud

and deceit, III) defamation, IV) commercial disparagement, V) unfair competition, VI) vicarious liability, VII) interference with present contractual relations (between PNA and its former representatives), VIII) interference with present and prospective contractual relations (between PNA and its local units), IX) Interference with present and prospective contractual relations (between PNA and health care employers) X) aiding and abetting, and XI) conspiracy. PNA sought compensatory and punitive damages.

PSEA removed the case to federal court on the ground that some of the claims were preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, and/or the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141-187, and moved for judgment on the pleadings on that basis. In an order dated June 6, 1995, and amended July 28, 1995, the district court granted PSEA's motion, dismissing counts II, IV, V, VI, VII, VIII, IX, X and XI to the extent that they were based on conduct covered by the NLRA, and denied the motion as to counts I (breach of fiduciary duty) and III (defamation), concluding that these claims were not preempted. The court remanded the case to the state court for disposition of the two remaining claims. PNA appealed. PSEA cross-appealed and filed a petition for writ of mandamus as an alternative.

PNA has not challenged our jurisdiction over PSEA's cross-appeal, but we must consider the jurisdictional question even where the parties are prepared to concede it. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993). 28 U.S.C. § 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This bar to review, however, has been held to apply only to remand orders issued pursuant to 28 U.S.C. § 1447(c), that is, where the case was remanded due to a defect in the removal proce-

dures or for lack of subject matter jurisdiction. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 222 (3d Cir. 1995); *Balazik v. County of Dauphin*, 44 F.3d 209, 212-13 (3d Cir. 1995). Here, the district court relied upon the discretionary ground stated in 28 U.S.C. § 1367(c)(3), which permits a district court to decline to exercise supplemental jurisdiction over state claims where it has dismissed all claims over which it has original jurisdiction. Accordingly, 28 U.S.C. § 1447(d) is inapplicable. *See Trans Penn Wax*, 50 F.3d at 224-25; *PAS*, 7 F.3d at 352.

Moreover, because the district court's remand order divested the federal court of all control over the action, our cases suggest that we would have jurisdiction under 28 U.S.C. § 1291. *See Powers v. Southland Corp.*, 4 F.3d 223, 231 n.9 (3d Cir. 1993); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 n.6 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991); *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 228 n.7 (3d Cir. 1990); *McLaughlin v. ARCO Polymers, Inc.*, 721 F.2d 426, 428 n.1 (3d Cir. 1983). The recent decision in *Quackenbush* supports this view. *See* 116 S. Ct. at 1719. In light of our decision that we have appellate jurisdiction, the petition for mandamus filed in this case is most.

II.

DISCUSSION

A.

NLRA Preemption

It is well established that state-law claims are presumptively preempted by the NLRA when they concern conduct that is actually or arguably either protected or prohibited by the NLRA, *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983),

and by the LMRA when such claims rely upon an interpretation of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988).

The general framework for determining whether particular state-law claims are preempted by the NLRA remains that initially established by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959), and more recently summarized as follows:

> [S]tate regulations and causes of action are presumptively preempted if they concern conduct that is *actually or arguably either prohibited or protected by the Act*. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects.

Belknap, 463 U.S. at 498-99 (citations omitted) (emphasis added); *see also Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676 (1983).

Either of the polarities of the *Garmon* analysis, arguable protection or arguable prohibition, will ordinarily suffice. In this case, the district court examined both protection and prohibition under the NLRA in ruling on PSEA's preemption claim. The court rejected PSEA's argument that the conduct alleged was protected by the NLRA, concluding that "section 7 does not protect a labor union's conduct in secretly enlisting another union's labor representative in a scheme to defraud the latter union of its right to represent various groups of workers." PSEA does not challenge that holding on appeal.

On the other hand, when the district court focused on the prohibition prong of the *Garmon/Belknap* formulation it concluded that the nine claims set forth in Counts II and IV through XI were preempted because they were arguably prohibited by two provisions of the NLRA, primarily section 8(b)(1)(A) but also section 9. Section 8(b)(1)(A) makes it "an unfair labor practice for a labor organization or its agents . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [section 7 of the NLRA]." *See* 29 U.S.C. § 158(b). Section 7 protects employees' rights to organize and, *inter alia,* to choose their bargaining agents.[1]

PNA argues that the conduct it alleges PSEA and the individual defendants engaged in was directed at PNA, rather than the nurses, and therefore the conduct must necessarily have been unrelated to employees' organizational rights, which is the concern of section 7. We do not agree. Conduct which undermines the union representing a unit of employees, and thereby induces those employees to change their affiliation, arguably "constrains or coerces" those employees in their ability to exercise their free choice of an exclusive representative.

Indeed, in one of the various branches of the PNA/PSEA controversy, PNA itself filed an unfair labor practice charge with the NLRB, complaining that PSEA engaged in activities similar to those it asserts here at the Polyclinic Medical Center which interfered with PNA's collective bargaining agreement with that employer. The NLRB ruled that the

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[1] Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157.

conduct of both PSEA and the employer violated section 8 of the NLRA. *See Polyclinic Medical Ctr.*, 315 N.L.R.B. 1257 (1995), *enforced sub nom. Pennsylvania State Educ. Ass'n v. NLRB*, 79 F.3d 139 (D.C. Cir. 1996). Both PNA's complaint and the Board's ruling illustrate the proposition that action targeted at a rival union may restrain employees in the exercise of their section 7 rights. Thus, even if the conduct here was directed at PNA, as it contends, rather than at the nurse-employees, it does not follow that section 8(b)(1) rights were not impacted.

Section 9 of the NLRA, the other provision the district court referred to as supporting its determination of preemption, gives the NLRB jurisdiction over selection of the union bargaining representative. As part of that responsibility, the NLRB has the authority to resolve disputes among competing unions and take action needed to ensure the workers' freedom of choice, including, if necessary, invalidation of an election. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276-79 (1974); *Weyerhauser Co.*, 247 N.L.R.B. 978, 978 n.2 (1980). Inasmuch as the conduct of which PNA complains arises, in essence, from a dispute or series of disputes between competing unions, each of whom sought to be the employees' exclusive representative, we agree with the district court that the conduct alleged may also have affected rights under section 9 as well as section 8(b)(1).

Notably, for preemption purposes a court need not decide whether the conduct alleged would be deemed to be prohibited by the NLRA, since it is enough that the conduct upon which the state causes of action are based is "arguably" prohibited. As the Court stated in *Garmon*, it is for the NLRB, not the courts, to decide whether the particular controversy falls within the scope of section 7 or 8 of the NLRA:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or

> § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.
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> . . . .
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> . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

Garmon, 359 U.S. at 244-46.

PNA suggests that even if the conduct alleged is arguably prohibited by the NLRA, as the district court found, this is not a case in which preemption should be applied. The Supreme Court's cases have referred to two circumstances in which state law is not preempted, even if the conduct at issue is arguably protected or prohibited by the NLRA. Those exceptions apply if the alleged conduct is of only "peripheral concern" to the NLRA, or "touches on interests . . . deeply rooted in local feeling and responsibility." *Jones,* 460 U.S. at 676 (citing *Garmon,* 359 U.S. at 243-44).

In this case, it is evident that we could not characterize the conduct at issue as of "peripheral concern" to the NLRA because it involves the core activities with which the Act is concerned: union organizing and the employees' election of an exclusive bargaining representative. However, we must also consider PNA's contention that this case falls within the local interest exception.

The Supreme Court has ordinarily applied this exception in cases where the conduct alleged concerned activity tradi-

tionally recognized to be the subject of local regulation, most often involving threats to public order such as violence, threats of violence, intimidation and destruction of property. *See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 136 (1976); *Garmon,* 359 U.S. at 247-248; *see, e.g., UAW v. Russell,* 356 U.S. 634 (1958) (upholding state court jurisdiction to entertain action by employee for harm resulting from strikers' threats of violence and exclusion by force). The Court has extended this exception to cover acts of trespass, *see Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 190-98 (1978), and certain personal torts, such as intentional infliction of emotional distress, *see Farmer v. United Bhd. of Carpenters, Local 25,* 430 U.S. 290, 304-05 (1977), and malicious libel, *see Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 57-63 (1966).

At least with regard to the nine claims which the district court found preempted (Counts II, IV, V, VI, VII, VIII, IX, X and XI), PNA has not demonstrated that any of these falls within the category of claims which the Court has determined "touch[] interests deeply rooted in local feeling and responsibility." *Belknap,* 463 U.S. at 498. Although PNA claims that "in a free market economy that places economic actors in competition with one another, the states have a substantial interest in policing the market to ensure that free competition does not degenerate into the law of the jungle," Appellant's Brief at 40, when the competition is between unions such matters are the particular concern of the NLRA. PNA has cited no authority supporting its argument that market regulation of competing labor organizations is a matter so rooted in local concern as to prevent preemption by the federal labor laws.

Even were we to conclude that the issue presented is one of particular state concern, the Court has cautioned that in

such circumstances, any state concern must be balanced against the risk that the exercise of state jurisdiction over the tort claim would interfere with the regulatory jurisdiction of the NLRB. *Jones,* 460 U.S. at 676 (whether targeted conduct implicates local interests "involves a sensitive balancing of any harm to the regulatory scheme established by Congress"); *Sears,* 436 U.S. at 188-89 (preemption decision turns on "the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting state court jurisdiction); *Farmer,* 430 U.S. at 297 (examination of both "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme" informs exceptions to NLRA preemption). As the Court explained in *Sears:*

> The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

436 U.S. at 197.

In the instant matter, much of the conduct forming the basis of the state tort claims also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding. This creates a risk of conflicting rulings from the state court and the Board, and threatens state interference with the NLRB's enforcement of national labor relations policy. *See Jones,* 460 U.S. at 682 (state claim preempted where fundamental element of claim

also had to be proved to make out a case under § 8 (b)(1)(B) of the NLRA).

Because PNA's state claims would overlap with NLRB issues, this case is distinguishable from *Sears*, upon which PNA relies. In *Sears,* the employer filed a trespass action in state court in an effort to end the union's picketing on its property. The Supreme Court rejected the union's claim that the action was preempted, noting that the controversy regarding the location of the picketing was unrelated to the issue Sears might have presented to the Board. To make out a state-law claim of trespass, Sears needed only to prove the location of the Union's picketing. An unfair labor practice charge, on the other hand, would have focused on the objectives of the picketing, an issue "completely unrelated to the simple question whether a trespass had occurred." 436 U.S. at 198. Thus "permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices." *Id.*

Similarly, in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983), another case relied on by PNA, the issues presentable in the two fora would have been unrelated. During a strike the employer had made offers of permanent employment to the replacement workers, but after the strike was resolved the employer laid off the replacement workers to make room for returning strikers. The fired replacement workers sued in state court for misrepresentation and breach of their employment contracts. The Supreme Court Concluded that the replacement workers' state court action was not preempted. It noted that issues as to whether the strike was to protest unfair labor practices and whether the employer was obliged to accept returning strikers were matters for the Board, whereas the state court action there concerned the employer's obligations to replacement workers rather than union members one issue would not trench upon the others. The controversies before the Board "would [not] have anything

in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Belknap*, 463 U.S. at 510. Maintaining the misrepresentation action therefore "would not interfere with the Board's determination of matters within its jurisdiction and . . . such an action is of no more than peripheral concern to the Board and the federal law." *Id.* at 510-11.

In the case before us, by contrast, the allegations that PSEA and the individual defendants sought to undermine PNA and influence the outcome of the nurses' representation election would be the focus of both the unfair labor practice charges and PNA's state-law claims. The risk of conflicting rulings and interference with Board enforcement of national labor policy is evident.

Having determined that the claim at issue here (1) involves activity that is actually or arguably prohibited by the NLRA; (2) does not involve an issue deeply rooted in local feeling and responsibility; and (3) would risk substantial interference with the jurisdiction of the NLRA were it litigated in the state courts, we conclude that Counts II, IV, V, VI, VII, VIII, IX, X and XI are preempted under the *Garmon* analysis. In reaching this conclusion, we reject PNA's attempt to replace the well-established *Garmon* analysis with an "identical controversy" test for preemption, which it urges this court to adopt based upon a statement in *Sears*[2] and fragments of statements from other Supreme Court cases where the Court found no preemption.

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[2] This language, quoted earlier in the text but repeated here for context, reads as follows: "The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board." *Sears*, 436 U.S. at 197.

Building upon its argument that the interests protected by PNA's state claims are different than those involved in an unfair labor practice case because they concern the common law rights of PNA as an entity, not the collective bargaining rights of its members, PNA argues that the claims that would be presented to the state court which involve PSEA's alleged interference with the operations of PNA are not identical to those that would be brought before the NLRB. Therefore, PNA concludes that under its identical controversy test there is no preemption. PNA also emphasizes that the state court could award it the $1,300,000 in damages it seeks for PSEA's alleged campaign to cripple and destroy PNA as a competitor, whereas the NLRB lacks authority to award such damages in an unfair labor practice proceeding. PNA thus insists that permitting its claim to go forward in state court poses no risk of interference with an NLRB proceeding.

While a respected commentator has noted that the Supreme Court's decisions in the labor preemption cases since 1945 "have been somewhat unclear if not inconsistent," Robert A. Gorman, *Basic Text on Labor Law* 766 (1976), we see no basis to hold, as PNA suggests, that the Supreme Court's more recent cases have replaced the analytic framework of *Garmon* and *Belknap*. Thus we see no justification for a court to abandon consideration of the threshold question, which is whether the matter at issue is peripheral to the concerns of the NLRA or a matter of particular local concern, and substitute therefor PNA's "identical controversy" test.[3]

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[3] Furthermore, we note that the Supreme Court has held that the fact that the NLRB cannot provide damages as a remedy is an insufficient reason by itself to warrant holding preemption inapplicable. *See Jones*, 460 U.S. at 684; *Garmon*, 359 U.S. at 246-47.

As the district court recognized, a Board proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted. This would require us to abandon more than half a century of federal policy that places exclusive jurisdiction over issues of national labor relations in the hands of the agency created by Congress to deal with them. Absent more explicit direction from Congress or the Supreme Court, we see no reason to do so.

PSEA also relies on the NLRA for its claim of preemption of yet another cause of action asserted by PNA, the claim for defamation in Count III. In that count, PNA alleges that all of the defendants caused the dissemination of false and unprivileged statements to local PNA members, intending to destroy the reputation and good name of PNA in the professional community, The district court rejected PSEA's preemption claim based on the Supreme Court's holding in *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966). In its cross-appeal, PSEA contends that *Linn* is inapplicable.

The lawsuit in *Linn* that was the subject of the preemption issue had been brought by a managerial employee of the Pinkerton National Detective Agency, whose employees were the subject of a union organizing campaign. Linn, an assistant general manager at Pinkerton, alleged that the union and the other defendants distributed leaflets and other written material containing defamatory material about him. The Supreme Court rejected the argument that the suit was preempted, concluding instead that "where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complaint pleads and proves that the statements were made with malice and injured him." *Id.* at 55.

PSEA contends that *Linn* is inapplicable because it concerned defamation of an individual who would have had no opportunity to obtain relief from the NLRB, whereas PNA is not without remedy since it can ask the NLRB to overturn the outcome of an election that may have been tainted by the allegedly defamatory statements.

Despite the initial appeal of PSEA's argument, upon close reading of *Linn* we conclude that this argument must fail. Nothing in the Supreme Court's *Linn* decision suggests any distinction between defamation of an individual and defamation of a labor union, nor did the Court suggest that the injured party should be permitted to seek relief in only one forum. To the contrary, the Court noted that in some situations it would be appropriate for a defamed union to seek relief both in the state courts and from the Board. *See* 383 U.S. at 66 ("When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief."). Specifically, it acknowledged that "[a]n unsuccessful union would . . . seek to set the election results aside as the fruits of an employer's malicious libel. And a union may be expected to request similar relief for defamatory statements which contribute to the victory of a competing union." In such a situation, "the courts and the Board [would not] act at cross purposes since, as we have seen, their policies would not be inconsistent." *Id.* at 66-67. Insofar as PSEA's preemption argument as to the defamation cause of action rests on the identity of the victim, *Linn* is conclusive.

Alternatively, PSEA contends that the defamation claim falls as a matter of law because the majority of the alleged statements were merely expressions of opinion, and therefore PNA cannot prove that they are false, let alone made with knowledge or reckless disregard for their falsity. But it is plain that at least the statement that PNA "had been in-

dicted by the United States Attorney's office for election fraud'' was a statement of fact, *see* App. at 40, and some of the statements set forth in paragraph 30 of the Complaint may also have been stated as fact. Additionally, PNA met its burden of pleading that the defendant employees made these statements with malice and knowledge of their falsity. *See* App. at 46-48. Because we must accept the allegations of the complaint as true and construe all inferences in PNA's favor, we will not look beyond the pleadings to assess the viability of PNA's cause of action for defamation but, rather, leave this task to the state court to which this cause of action was remanded.

B.

LMRA Section 301 Preemption

In addition to its reliance on the preemptive force of the NLRA, PSEA also claimed that the LMRA preempted Count I (breach of fiduciary duty) and Count II (fraud and deceit). The district court rejected PSEA's claim, although as noted earlier Count II was among the nine causes of action the court held were preempted by the NLRA. PSEA challenges in its cross-appeal the court's ruling of non-preemption of Counts I and II on LMRA grounds.

The Supreme Court has explained the principle of preemption pursuant to § 301 of the LMRA as follows:

> If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles — necessarily uniform throughout the Nation — must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988). *See also Trans Penn Wax Corp. v. McCand-*

less, 50 F.3d 217, 228 (3d Cir. 1995). This principle extends beyond suits alleging contract violations to suits grounded in tort as well. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 210-211 (1985). Section 301 does not, however, "pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* at 212. Only state-law rights and obligations that depend upon an interpretation of the collective bargaining agreement are preempted.

PSEA contends that these two state tort claims are preempted by the LMRA because their resolution turns on an interpretation of the collective bargaining agreement between PNA and the Professional Staff Organization (PSO), the union that represented four of the individual defendants — Debra Ferguson, Richard Lewis, Jeffrey Lewis, and Karen Schrader ("employee defendants").

PSEA argues that any duties of loyalty and truthfulness on which PNA bases its claims against the employee defendants for breach of fiduciary duty and fraud could only have arisen out of PSO's collective bargaining agreement with PNA, which was the exclusive contract governing the employee defendants' relationship with PNA. A determination whether the employees had breached such duties would accordingly require interpretation of that agreement. The district court rejected this argument because it found nothing in the collective-bargaining agreement giving rise to the fiduciary duties allegedly breached.

PSEA insists, however, that fiduciary duties may be implied from the collective-bargaining agreement and that the determination of an implied term in the agreement is exclusively a matter of federal contract interpretation. *See Allis-Chalmers,* 471 U.S. at 215 ("The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner,

and, if so, whether [the employer's] conduct breached that implied contract provision.'').

But Counts I and II of PNA's complaint are not grounded in the collective-bargaining agreement between PNA and PSO nor in any independent employment contracts between the employee defendants and PNA. Instead, these counts are based on Pennsylvania common law which recognizes, under agency principles, a duty of loyalty by an employee to an employer. *See Sylvester v. Beck,* 178 A.2d 755, 757 (Pa. 1962); *SHV Coal, Inc. v. Continental Grain Co.,* 545 A.2d 917, 920-21 (Pa. Super. Ct. 1988)(citing Restatement (Second) of Agency §§ 394, 387, 400, 401), *rev'd on other grounds,* 587 A.2d 702 (1991).

Even if PNA could have grounded its action on an implied duty in the agreement, it need not have done so. As the Supreme Court has stated, ''the plaintiff is the master of the complaint,'' and ''may, by eschewing claims based on federal law, choose to have the cause heard in state court.'' *Caterpillar Inc. v. Williams,* 482 U.S. 386, 398-99 (1987). Thus, ''a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independently* of that agreement.'' *Id.* at 396 (emphasis in original). Counts I and II therefore do not require an interpretation of the collective-bargaining agreement and are not preempted by section 301. It follows that we find no basis to support PSEA's cross-appeal on either of the grounds it asserts.

III.

CONCLUSION

For the foregoing reasons, we will affirm the order of the district court, which dismissed nine of the claims asserted by PNA as preempted by the NLRA and, after holding that counts I and III are not preempted, remanded those counts to state court. Each party to bear its own costs.

ROSENN, *Circuit Judge, concurring and dissenting.*

Except as to the Pennsylvania Nurses Association's (PNA's) allegations charging the defendants with interfering with present and prospective contractual relations with local bargaining units and employers (Counts VIII and IX), the remaining counts of the complaint allege that four PNA employees, while on PNA's payroll, betrayed their employer, engaged in fraud and deceit, defamation, and other acts of personal misconduct in violation of Pennsylvania's common law duty of basic loyalty by an employee to an employer. Several of these counts also charge the Pennsylvania State Education Association (PSEA) and some or all of the other defendants with unfair competition, commercial disparagement, conspiracy, and other conduct in violation of state law.

The majority opinion holds that the Labor Management Relations Act (LMRA) does not preempt the specific charges relating to breach of fiduciary duty (Count I) and fraud and deceit (Count II), and affirms the district court's order remanding Count I to state court. The majority concludes: (1) that these counts are not grounded in either the collective bargaining agreement between PNA and PSO nor in any independent contracts between the employee defendants and PNA; and (2) they do not require an interpretation of the collective bargaining agreement. I concur and also agree that there is no basis to support the PSEA's cross-appeal.

I concur further with the majority's conclusion that the NLRA does not preempt PNA's claim for defamation in Count III. I agree that the Supreme Court's decision in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966) controls.

On the other hand, the majority concludes that the remaining allegations are preempted by the National Labor Relations Act (NLRA). Except for Counts VIII and IX which are

arguably preempted, I do not believe that the NLRA preempts the other seven counts.[1]

Although the plan allegedly concocted by the four former employees of PNA eventually enveloped the PSEA, the allegations, except as to Counts VIII and IX, have nothing whatsoever to do with the core activities of the NLRA. These counts do not involve traditional union organization activities, employees' election of an exclusive bargaining representative, or unfair labor practices. Rather, they basically concern forbidden conduct between employees and their employer, and activities of a competing employer that is prohibited by common law, not by federal law. A state court's authority to resolve allegations of fraud, commercial disparagement, unfair competition, interference with employment contracts, and conspiracy in no way invades the central scheme of the NLRA. Because presentation of these allegations to a state court does not offend federal labor policy, I would reverse the judgment of the district court insofar as it held the remaining seven counts preempted. I therefore respectfully dissent.

I.

As does the majority, I accept as true the well-pleaded allegations in PNA's complaint and draw all inferences therefrom in favor of PNA. PNA is a professional association of registered nurses and a nurses labor union. Prior to June 30, 1993, it represented over 9000 nurses for collective bargaining purposes in 60 local bargaining units (locals). These locals were located in private hospitals and public sector institutions in Pennsylvania and Delaware.

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[1] The seven counts are: II (fraud and deceit); IV (commercial disparagement); V (unfair competition); VI (vicarious liability); VII (interference with present contractual relations between PNA and its former labor representatives); X (aiding and abetting); and XI (conspiracy).

PNA employed defendant Debra Ferguson as a labor representative on February 1, 1983, to serve in its labor union and collective bargaining program. As a labor representative, she had the responsibility for, *inter alia*, organizing locals, negotiating collective bargaining agreements between PNA and hospitals that employed their member nurses, and administering and enforcing collective bargaining agreements through grievance and arbitration procedures. Her responsibilities also included communications between PNA and its locals, and providing for the cultivation and maintenance of organizational relationships between them. As a paid labor representative of PNA, she also had the duty to keep her employer apprised of local unit activities, to act honestly, in good faith and in the best interests of PNA. This required that she take all necessary and appropriate measures to protect the PNA locals from raids by competing labor unions. PNA also hired the defendants Richard Lewis, Jeffrey Lewis, and Karen Schrader as labor representatives with similar duties.

Apparently, sometime in the first half of 1993, these PNA employees decided that they wanted to become employed as labor representatives by some other labor union and determined that they would be able to achieve such employment more readily if they could bring with them PNA locals that they represented in their capacity as labor representatives of PNA. They therefore undertook a program, although on PNA's payroll, to undermine their locals' relationship and loyalty to PNA by convincing them to disaffiliate.

Debra Ferguson had developed a strong interest in affiliating with PSEA, a labor union engaged in representing school employees. Her husband, Thomas, formerly employed with PNA until 1988, was employed by PSEA as a labor representative. Debra Ferguson sought to gain employment with PSEA by offering to bring with her as many PNA locals as possible. To do this, she developed a scheme,

along with her husband and another PSEA representative, Alfred Nelson, to enlist the assistance of Richard Lewis, Jeffrey Lewis, and Karen Schrader to sway the PNA local and their leadership from PNA to affiliation with PSEA, with each eventually becoming employed with PSEA. Under their plan, they would act as PSEA labor representatives to the former PNA locals. PSEA knowingly assented and collaborated, and Thomas Ferguson and Alfred Nelson actively assisted. PSEA offered employment to and actively assisted and encouraged Debra Ferguson and her three co-employees in their efforts to make the switch in affiliation.

Under federal law, PNA had the exclusive right to negotiate and enter into new collective bargaining agreements during the period of time from 90 days before the existing contract between PNA and the employers expired. In other words, during this 90-day period, prior to the expiration of a collective bargaining agreement, no competing union is permitted to interfere with PNA's exclusive right to bargain for a new agreement on behalf of its local. Only in the event that a renewal contract is not reached prior to contract expiration could a competing union such as PSEA seek representation of the local.

Collective bargaining contracts between PNA and various hospitals were scheduled to expire during July and August of 1993, and Debra Ferguson and her three co-labor representatives led PNA to believe that they were faithfully negotiating renewal agreements on behalf of PNA. They led PNA to believe that they were protecting its interests as exclusive bargaining agent for the locals. However, pursuant to the plan of the four former employees and with the knowledge and active assistance of PSEA's representatives, Debra Ferguson and the other plotters, while still employed by PNA and presumably acting in its best interests, undertook to do the following: (1) They refrained from negotiating renewal agreements for the PNA locals under their responsi-

bility, allowing the agreements to expire. This deprived PNA of its exclusive right to bargain on behalf of its locals prior to contract expiration; it rendered PNA vulnerable to other unions and gave PSEA the opportunity to seek representation of PNA locals; (2) They disparaged PNA's reputation, and the reputation of its officials, in their efforts to persuade locals to disaffiliate from PNA.

The defendant labor representatives actively solicited PNA locals to sign election cards for PSEA representation and engaged in other disloyal and improper activities, including the distribution of propaganda promoting PSEA at the expense of PNA. They also encouraged and aided PSEA to expand its union parameters to include representation of nurses.

Finally, Debra Ferguson and her three co-employees, with the assistance of PSEA, Thomas Ferguson, and Alfred Nelson, produced and promulgated false, malicious and defamatory propaganda designed to destroy the reputation of PNA, including a false report that PNA officials had been criminally indicted by the federal government. The conspiratorial conduct of PSEA and the individual defendants, the complaint alleges, was designed to cripple and destroy PNA as a nurses union and to facilitate the succession of PSEA as the primary nurses' union in Pennsylvania.

II.

The majority relies on the preemption doctrine as literally stated by the Supreme Court in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). *Garmon* held that where a labor relations activity is arguably subject to sections 7 or 8 of the NLRA, as the picketing there involved, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to

be averted." *Id.* at 245. The majority concludes that the NLRA arguably prohibits the conduct alleged in PNA's complaint. Thus, it holds the seven counts identified in note 1 herein preempted.

I do not believe that the foregoing conduct is prohibited or arguably prohibited by either Sections 8 or 9 of the NLRA. As the majority explains, NLRA Section 8 prohibits conduct that restrains or coerces employees in their right to organize or bargain collectively through representation of their own choosing. 29 U.S.C. §§ 157, 158. The conduct referred to in the seven counts was not directed at the employees of the employer hospitals represented by PNA, but was directed at PNA as a legal entity. It neither restrained nor coerced employees of the hospitals or government facilities in their right to organize or bargain collectively through representatives of their own choosing. No campaigning, organizing or election processes were involved because the defendants' activities preceded such possibility.

Similarly, the conduct of which PNA complains in no way restrains or coerces employees in their right to organize. It is aimed at PNA. When PNA's four former employees commenced their scheme to switch the PNA locals to a union with whom they would seek employment, there was no organizational campaign on the part of PSEA or any other union to represent these locals. The existing contracts were not yet open to competing unions. No NLRA election procedures were involved; no validation or invalidation of an election conducted by the NLRB was sought. There was no recognitional dispute at that time between PNA and PSEA.

The majority points to the recent case of *Polyclinic Medical Center,* 315 N.L.R.B. 1257 (1995), *enforced sub nom. Pennsylvania State Educ. Ass'n v. NLRB,* 79 F.3d 139 (D.C. Cir. 1996) to "illustrate the proposition that action

targeted at a rival union may restrain employees in the exercise of their section 7 rights." (Maj. Op. p. 9) *Polyclinic,* however, is an example of a case properly before the Board, and wholly distinguishable from the case before this court. It in no way involves the issue before us in this case. PNA was the charging party in that case where it appropriately complained that the hospital-employer engaged in an unfair labor practice by unlawfully withdrawing recognition of PNA and entering into a bargaining agreement with PSEA, absent evidence that PSEA enjoyed the support of the majority of employees.[2] The Board ordered Polyclinic to, *inter alia,* cease and desist from recognizing and bargaining with PSEA unless PSEA demonstrates its majority status. The District of Columbia Court of Appeals enforced the order, finding that Polyclinic and PSEA engaged in a collective bargaining agreement in violation of the NLRA. *Pennsylvania State Educ. Ass'n,* 79 F.3d at 154. In contrast, the case before us presents no issue of representation or election procedure.

The majority believes that Section 9 of the NLRA also arguably prohibits the conduct alleged in this case because the Section gives the NLRB the authority "to resolve disputes among competing unions and take action needed to ensure the workers' freedom of choice, including, if necessary, invalidation of an election." (Maj. Op. p. 9) Although this case has a union background, that alone does not grant the Board exclusive jurisdiction over every controversy

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[2] *Polyclinic* illustrates that PNA, as an experienced labor union, knew when it should invoke the jurisdiction of the Board. As the defendants noted in their brief to the district court, "PNA was aware of and knew how to invoke the jurisdiction of the NLRB." Defendants' brief in district court in support of motion for judgment on pleadings, A 191, N.8. The filing of charges with the Board in no way dissipates PNA's common law claims with respect to these defendants for their activities at Polyclinic and the other hospitals and facilities referred to in PNA's complaint in these proceedings.

arising between an employer and its employees or over every dispute between two unions. Surely, no one would suggest that the NLRB has jurisdiction over a land dispute merely because the parties are two distinct unions. No one would suggest that the Board has jurisdiction over a contractual dispute with respect to the right to operate a recreation camp for children because the dispute is between competing unions. Here, as discussed, the alleged conduct involves PNA as an employer and four individual defendants in their capacity as employees, over their contractual rights and duties unrelated to any collective bargaining agreement; it also involves conspiratorial conduct between those employees and another union wholly unrelated to authorities under the jurisdiction of the NLRB. Section 9 grants the Board authority to resolve *representation* disputes among competing unions. The parties in this case do not request the Board's intervention in an election or representation proceeding.

III.

It must be noted that, in *Garmon,* the Court also carved out exceptions to the general rule of preemption that recognized traditional factors that preserve state jurisdiction. It concluded that where the activity was merely of "peripheral concern" to the Labor Management Relations Act, the states retain the power to regulate. 359 U.S. at 243. States also retain jurisdiction over matters of compelling local interest. *Id.* at 247. Thus, states should be free to award damages under state tort law for violent conduct, or for a basic breach of or interference with a contract between an employer and employee unrelated to any collective bargaining agreement.

The majority here dismisses the "peripheral concern" exception without discussion, concluding that the conduct at issue involves "core activities with which the Act is concerned: union organizing and the employees' election of

an exclusive bargaining representative.'' (Maj. Op. p. 10) I do not believe the majority categorizes PNA's claims correctly. This case does not implicate the core concerns of the Act. Rather, it primarily requires a forum that can determine PNA's rights as an employer vis a vis its own employees, not the employees it represents for purposes of collective bargaining, and whether PNA's employees violated those rights. Further, PNA seeks damages for the conduct of all the defendants which had not yet reached a point over which the NLRB had jurisdiction.

Thus, PNA brought this suit for damages only in the state court for breach of fiduciary duty by its four former employees and business agents, for their fraud, deceit, and defamatory actions; it charged PSEA and its agents for unfair competition and interference in the employment contracts between PNA and its former labor representatives; and it sued all of the defendants for commercial disparagement and conspiracy. These are matters that traditionally have occupied the attention and jurisdiction of state courts and at best are only of peripheral concern to the National Labor Relations Board.

Moreover, the state of Pennsylvania has a substantial interest in protecting the rights of its citizens against the fraudulent and other misconduct alleged in this case. Under Pennsylvania law, an agent, or employee, owes a duty of loyalty to his employer, and must act with utmost good faith and loyalty in furtherance of the employer's interests. *Kademenos v. Equitable Life Assurance Soc. of U.S.,* 513 F.2d 1073, 1076 (3rd Cir. 1975); *Garbish v. Malvern Fed. Sav. & Loan Ass'n,* 517 A.2d 547, 553-54 (Pa.Super 1986).

Although the Court has sustained the right of Congress to legislate in the areas of labor relations, Congress has not completely occupied the field. ''[T]he areas that have been preempted by federal authority and thereby withdrawn from

state power are not susceptible of delineation by fixed metes and bounds." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1954). As the Court observed in *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953), the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much." *Id.* at 488.

For almost a quarter of a century following the enactment of the NLRA in 1935, the Court has endeavored to justify its preemption decisions in terms of congressional intent to preempt, "although the Act offers no specific guidance for applying this principle." 2 Patrick Hardin, *The Developing Labor Law* 1657 (3rd ed. 1992). Many of the Court's decisions "appear to have been based on pragmatic analysis of relevant fact and circumstances, but the results often were ascribed to the will of Congress." *Id.* at 1658.

In the 25 years that has elapsed since *Garmon*, the Court has refined, and perhaps even extended its exceptions to preemption. The Court has warned that:

> While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor preemption doctrine in this Court does not support an approach which sweeps away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188 (1977); *see also Farmer v. Carpenters*, 430 U.S. 290, 302 (1976). ("[I]nflexible application of the [*Garmon*] doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal regulatory scheme.").

Post-*Garmon* case law reveals that the Court has made a detailed factual analysis in each case before it in an effort to ascertain whether the claims in the state court would offend federal policies established by the Board. Under the current status of the law, the Court is concerned with not only preserving federal jurisdiction in labor cases, but has exhibited, since *Garmon,* a sensitive and pragmatic concern for the preservation of claims in state court that do not encroach upon the Board's jurisdiction.

In *Farmer,* the Court concluded that Hill, a member of the Carpenter's Union who complained of union discrimination in its hiring hall and other tortious conduct, could pursue a tort action brought in a state court against the union and its officials to recover damages for intentional affliction of emotional distress. 430 U.S. at 292-93. The Court reasoned that, in light of the discrete concerns of the federal scheme and state tort law, the potential for interference with the Board's proceedings if a complaint were filed with the court "is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304. In *Sears,* the Court noted that when a claim involves conduct arguably prohibited by the Act, the "critical inquiry" is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the labor board." 436 U.S. at 197.

The majority dismisses PNA's "identical controversy" argument asserting that PNA is attempting to construct a new exception to *Garmon*, or replace *Garmon's* analytical framework with a new test. I do not suggest that this court abandon the *Garmon* analysis. However, I believe the "identical controversy" test can aid courts in determining if conduct "arguably prohibited" by the NLRA may be litigated in a state court. Supreme Court case law focusses on whether the conduct is central to the Act, whether the state

interest in regulation is compelling, and whether the state's exercise of jurisdiction risks interference with the federal regulatory scheme. *See e.g. Belknap,* 463 U.S. 491, *Farmer,* 430 U.S. 290, *Linn,* 383 U.S. 53.

I disagree with the majority here that the Supreme Courts's decision in *Belknap,* 463 U.S. 491, is distinguishable. In fact, *Belknap* strongly supports PNA's position that its seven counts are not preempted. In that case, negotiations for a new contract between the union and employer reached an impasse, some employees struck, and the employer unilaterally granted a wage increase to employers who stayed on the job. The wage increase became the basis for an unfair labor practice charge filed by the union with the Board and the employer countered with charges of its own. The employer hired replacement workers, promising permanent employment, but dismissed them to make room for the returning strikers. The replacement workers sued under state law theories of misrepresentation and breach of employment contract. Despite the unfair labor practice proceedings before the Board growing out of the strike, the Court held that the Act did not preempt the replacement workers state law suit. It stated:

> [T]he suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of the strikers. The interests of the Board and the NLRA, on one hand, and the interests of the State in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns. We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.

Id. at 512 (citations omitted). In so holding, the court found that the returning workers' claims were not "identical" to

the controversy before the Board. The Board's focus was on the rights of the striking workers, while the state court would focus on the rights of the replacement workers. *Id.* at 510.

In the instant case, even if a proceeding were initiated before the Board, the interests, as in *Belknap,* are different. The Board would be concerned with the defendants' coercive conduct towards the union nurses affecting their freedom of choice; the state court would be concerned with the breach of the defendants' obligations to PNA. As in *Belknap,* the state court in this case "in no way offers [the plaintiff] an alternative forum for obtaining relief that the Board can provide." *Id.* at 510. Although not dispositive, an important factor in preemption analysis is that the NLRB is unable to award relief to PNA for the alleged damage caused by PSEA and the individual defendants. *See, e.g. Farmer,* 430 U.S. at 304 (noting that the Board could not award damages for plaintiff's alleged pain, suffering, and medical expenses), *Linn v. Plant Guard Workers,* 383 U.S. 53, 64 (1965) (noting the Board's inability to provide redress for personal injury caused by malicious libel).

This case is distinguishable from *Operating Engineers v. Jones,* 460 U.S. 669 (1982). In *Jones,* a newly appointed supervisor filed a charge before the NLRB, alleging that the union instigated the supervisor's discharge because he was not a member in good standing with the union. The Board declined to issue a complaint. The supervisor then filed suit in state court, alleging that the union interfered with his employment contract by coercing the company to breach the contract. The Supreme Court found the supervisor's state law claim preempted by the NLRA.

The Court found that the alleged conduct was arguably prohibited by the Act, and that the controversy before the

state court was identical to that brought before the Board. In *Jones,* the resolution of both the state law and the Board action involved an analysis of whether the union coerced the employer into terminating the supervisor. In the instant case, however, there could only be the remote possibility that the Board might be called upon to determine if the defendants coerced the nurses in the collective bargaining units in the exercise of their Section 7 rights. In contrast, the state court would focus on whether the defendants' conduct injured PNA.

Unlike *Jones,* the exercise of state jurisdiction over the common law tort claims in the instant case would not have any effect on federal labor policy. The court would focus on the conduct as it specifically affected the employer-employee relationship between PNA and the individual defendants, not employees in the collective bargaining units, and on PSEA's entrepreneurial behavior in violation of state law. Thus, state jurisdiction here creates no significant risk of impact on federal labor law.

IV.

In contrast to the seven counts discussed above, I acknowledge that PNA's Counts VIII and IX involve matters appropriate for the Board. In Count VIII, PNA alleges that the defendants interfered with its relationship with its local bargaining units. PNA asserts that the defendants were aware of its right to bargain with its locals prior to the expiration of their bargaining agreements. The defendants allegedly interfered with PNA's prospective contractual relations with the local units with the intent to displace PNA as the exclusive bargaining agent. Similarly, in Count IX, PNA alleges that the defendants interfered with the collective bargaining agreements between PNA and various health care employers.

These two counts focus on the bargaining agreements and the relationship between PNA, their locals, and their employers. The alleged behavior is arguably prohibited by both Sections 8 and 9 of the NLRA. In contrast to the seven counts discussed above, Counts VIII and IX involve core concerns of the Act. Thus, I agree with the majority that the NLRA preempts Counts VIII and IX.

V.

To recapitulate, I respectfully dissent from the opinion of the majority in affirming the order of the district court dismissing Counts II, IV, V, VI, VII, X and XI as preempted by the NLRA. However, I concur with the majority that the NLRA preempts Counts VIII and IX of PNA's complaint.

I further concur with the majority in affirming the order of the district court in holding that Counts I and III are not preempted and directing each side in this appeal to bear its own costs.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-94-880

PENNSYLVANIA NURSES ASSOCIATION,
Plaintiff

vs.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, DEBRA FERGUSON, RICHARD LEWIS, JEFFREY LEWIS, KAREN SCHRADER, ALFRED NELSON, JR., THOMAS FERGUSON,
Defendants

MEMORANDUM

[Filed Harrisburg, PA, JUN -6 1995
Mary E. D'Andrea, Clerk Per /s/ HG]

I. Introduction.

We are considering the Defendants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The Plaintiff is the Pennsylvania Nurses Association (PNA), both a professional association of nurses and a nurses' labor union. It filed this action in state court seeking redress under various state-law theories for the Defendants' conduct in connection with either the choice of a bargaining agent or the execution of a collective bargaining agreement (CBA) at eight health-care facilities. The Defendants are the Pennsylvania State Education Association (PSEA), a school employee's labor union; Alfred Nelson, Director of Organizing and Media Relations for PSEA; and Thomas Ferguson (''Mr. Ferguson''), a labor representative for PSEA. The Defendants also include four individuals who were labor

representatives for PNA but who now work in that capacity for PSEA, Debra Ferguson ("Mrs. Ferguson"), Richard Lewis, Jeffrey Lewis, and Karen Schrader.

The Defendants removed the action to this court on the basis that some of the Plaintiff's claims were preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Preemption, under either federal or state labor law, is also the basis of their motion, which we must decide by viewing "the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party . . . . " *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 406 (3d Cir. 1993).

II. Background.

We take this background from the Plaintiff's complaint. Before June 30, 1993, PNA represented some nine thousand nurses in collective bargaining through sixty local bargaining units throughout Pennsylvania and Delaware, including nurses who worked at health care facilities owned by the Commonwealth of Pennsylvania. (Complaint, ¶ 11). At that time, PNA employed Debra Ferguson, Richard Lewis, Jeffrey Lewis, and Karen Schrader as labor representatives. Their duties included "organizing PNA local units, negotiating collective bargaining agreements between PNA and the hospitals that employ PNA member nurses, . . . administering and enforcing collective bargaining agreements through grievance and arbitration procedures . . ., cultivat[ing] and maintain[ing] . . . organizational relationships between PNA and its local units . . . [and] keep[ing] PNA apprised of all local unit activities . . . ." (*Id.*, ¶ 13 and 21) (brackets added).

These individuals decided that they no longer wanted to work for PNA, (*id.*, ¶ 16), and that they could increase their

chances of finding employment with another labor union if they brought along the PNA local units they represented. (*Id.*, ¶ 17). Specifically, Mrs. Ferguson decided that she wanted to work for PSEA and was assisted and encouraged by PSEA in enlisting the other PNA labor representatives in a plan to separate the PNA local units from PNA. (*Id.*, ¶ 20 and 21).

In pursuit of this plan, Mrs. Ferguson and the other labor representatives, while ostensibly in the employ of PNA, did the following, among other things:

> 1. failed to negotiate in good faith new CBAs on behalf of their PNA local units with the respective health care facilities, resulting in an opportunity for PSEA to attempt to represent the units once the current agreements expired;
>
> 2. "disparaged PNA's reputation as a Pennsylvania nurses' labor union, and the reputation of its officials, in order to persuade unit members to disaffiliate from PNA"; and
>
> 3. "actively solicited unit members to sign election cards for PSEA representation."

(Complaint, ¶ 22).

For its part, PSEA did the following, among other things, to further the conspiracy:

> 1. sought authorization from its Board of Directors to allow it to represent nurses as well as teachers;
>
> 2. met with the executive and negotiating committees of various PNA local units along with the labor representatives (while they were still ostensibly employed by PNA) "to persuade them to dissociate from PNA and join PSEA";
>
> 3. "held meetings with PNA local memberships and, together with Mrs. Ferguson and the above named

> individuals, spoke in favor of affiliating with PSEA and against PNA";
>
> 4. "produced and promulgated false, malicious, and defamatory propaganda designed to destroy the reputation of PNA";
>
> 5. "held out employment with PSEA as incentive or inducement to Mrs. Ferguson and the other named labor representatives to assist in the affiliation of PNA local units with PSEA . . ."

(*Id.*, ¶ 23).

Based on the foregoing general description of its claim and further details in the complaint, PNA has made the following state law claims:

> Count I—breach of fiduciary duty. The PNA labor representatives breached their duty of loyalty, good faith and honesty to their employer PNA by working for PSEA when they should have been advancing the interests of PNA;
>
> Count II—fraud and deceit. The PNA labor representatives committed common-law fraud against PNA by their actions;
>
> Count III—defamation. All the defendants caused the dissemination of false and unprivileged statements to local PNA members, intending to destroy the reputation and good name of PNA in the professional community;
>
> Count IV—Commercial disparagement. In making the foregoing communications, all the defendants intended to, and did cause, pecuniary loss to PNA;
>
> Count V—Unfair competition. Defendants Alfred Nelson, Mr. Ferguson and PSEA induced the PNA employees to leave their employ with PNA with the intent to cripple PNA and put PNA out of business, and used PNA propriety information in carrying out this scheme;

Count VI—Vicarious Liability. PSEA is liable for the acts of the individual defendants as its agents;

Count VII—Interference with Present Contractual Relations (the employment contracts with PNA's former labor representatives other then Mrs. Ferguson). Defendants, Mr. Ferguson, Mrs. Ferguson, PSEA and Alfred Nelson, interfered with the employment contracts of the PNA labor representatives;

Count VIII—Interference with Present and Prospective Contractual Relations (contracts between PNA and its local units). All the defendants interfered with PNA's contractual right to bargain exclusively on behalf of their local units without interference from a competing union, acting with the purpose and intent to displace PNA as the exclusive bargaining agent;

Count IX—Interference with Present and Prospective Contractual Relations (contracts between PNA and the Health Care Employers). All the defendants interfered with PNA's existing contractual relationships with employers by interfering with its exclusive right to bargain with the employer by undermining protected negotiations with employers, doing so with the intent to displace PNA as the exclusive bargaining agent;

Count X— Aiding and Abetting. Defendants, Mr. Ferguson, PSEA and Alfred Nelson, materially assisted in the wrongful conduct of the PNA labor representatives while the latter breached their duties to PNA and defendant, Mrs. Ferguson, aided the wrongful conduct of the other PNA labor representatives;

Count XI—Conspiracy. All the defendants conspired together to commit unlawful acts designed to cause PNA local units to disaffiliate from PNA.

PNA seeks compensatory and punitive damages.

III. Discussion.

A. NLRA Preemption.

The Defendants argue that counts II (fraud), IV (commercial disparagement), V (unfair competition), VI (vicarious liability), VII (interference with present contractual relations), VIII (interference with present and prospective contractual relations), IX (interference with present and prospective contractual relations), X (aiding and abetting) and XI (conspiracy) are preempted by the NLRA or state labor law and that they therefore must be dismissed because they are subject to the primary jurisdiction of the National Labor Relations Board (Board) or its counterpart state agencies.[1] We will deal here with preemption under the NLRA, which Defendants invoke under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

Garmon protects the Board's primary jurisdiction to adjudicate disputes under the NLRA. Under *Garmon* preemption:

> state regulations and causes of action are presumptively preempted if they concern conduct that is actually or

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[1] Five of the health-care facilities were private ones located in Pennsylvania, two were public facilities in Pennsylvania, and one was a public facility in Delaware. The private facilities are subject to the NLRA and the public facilities are subject to its state counterparts, the Pennsylvania Public Employee Relations Act, 43 P.S. § 1101.101-1101.2301 (Purdon 1991), and 19 Del. Code Ann. chap. 13, §§ 1301-1312, formerly entitled the "Right of Public Employees to Organize," and now reenacted as "the Delaware Public Employment Relations Act," also found at 19 Del. Code Ann. chap. 13. The Defendants maintain that these states have adopted the federal doctrine of primary jurisdiction for cases under state law. As will be shown below, we need not address the state labor-law issues of preemption to dispose of the Defendants' motion.

> arguably either prohibited or protected by the Act. *Id.*, at 245. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.*, at 243-244; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 200 (1978); *Farmer v. Carpenters*, 430 U.S. 290, 296-297 (1977). In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate controversies committed to it by the Act, *Farmer v. Carpenters, supra,* at 297; *Sears, Roebuck & Co. v. Carpenters, supra,* 436 U.S., at 200, and the risk that the state will sanction conduct that the Act protects. *Id.*, at 205.

Belknap, Inc. v. Hale, 463 U.S. 491, 498-99, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798, 807 (1983).

1. Protected or Arguably Protected Conduct.

The Defendants first assert that their conduct is either protected activity or arguably protected activity under section 7 of the NLRA and that the Plaintiff's state law claims are therefore preempted. Section 7, 29 U.S.C. § 157, protects, in part, employees' "right to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing." (brackets added).

We reject this argument because, in evaluating preemption under the "arguably protected" part of the *Garmon* test, we must look to the Defendants' conduct as alleged in the complaint, not whether the conduct had as its goal the securing or the exercise of section 7 rights, the focus of the Defendants' argument. *See Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, 302, 97 S.Ct. 1056,

1064, 51 L.Ed.2d 338, 351 (1977) (''No provision of the National Labor Relations Act protects'' against ''outrageous conduct'' intended to inflict emotional distress, as alleged in the complaint). We believe that section 7 does not protect a labor union's conduct in secretly enlisting another union's labor representatives in a scheme to defraud the latter union of its right to represent various groups various groups of workers. The Defendants' conduct is therefore not protected or arguably protected under the NLRA.

2. Prohibited or Arguably Prohibited Conduct.

We must therefore consider the Defendants' alternative argument that their conduct was prohibited or arguably prohibited as an unfair labor practice under the NLRA. While denying any wrongdoing, the Defendants assert that the conduct that allegedly affected the nurses' choice of a bargaining representative was prohibited under section 8(b)(1) as an attempt to coerce employees in the exercise of the section 7 right ''to bargain collectively through representatives of their own choosing.''[2] They also contend that the conduct would have affected rights under section 9, 29 U.S.C. § 159, which deals with the Board's authority to conduct elections to determine who will be the workers' exclusive bargaining agent, and under which the Board may invalidate an election for conduct that interferes with the workers' freedom of choice in the election. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973).[3]

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[2] Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1), makes it ''an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 [section 7] of this title . . . .''

[3] ''Although the Court's original articulation of the preemption doctrine referred only to violations of sections 7 and 8, . . . its underlying rationale, concern for interference with the Board, applies equally to section 9.'' *Hobbs v. Hawkins*, 968 F.2d 471, 476 (5th Cir. 1992) (footnote omitted).

We agree with the Defendants' analysis. The conduct underlying the counts they assert are preempted by *Garmon* is either prohibited or arguably prohibited under the NLRA. These state-law causes of action are therefore preempted, and we must defer to the primary jurisdiction of the Board to resolve the underlying dispute.

The Plaintiff argues that the causes of action are not preempted, based on the following line of authority which allowed certain state causes of action to proceed: *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (defamation); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (intentional infliction of emotional distress); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (trespass); *Belknap, supra* (breach of contract by replacement workers against employer for failure to abide by promise to keep them on the payroll after striking workers returned).

The Plaintiff maintains that these cases establish that "state-law tort claims [are] not preempted by the NLRA." (Plaintiff's opposition brief at p. 13) (brackets added), and that preemption occurs only when the state-law claim is identical to the claim that could be brought under the NLRA. According to the Plaintiff, the claim is identical only when: (1) the "focus" of the Board and the court are the same "with respect to the identity of the party asserting a right." (Plaintiff's opposition brief at p. 20). Further, we must look at "whether the right arises under state law or the NLRA, and whether the remedies sought by the aggrieved party are found under state law or the NLRA." *Id.*

Proceeding under this analysis, the Plaintiff contends that its claims are not preempted because the unfair-labor-practice charge it could have brought would have been to

redress the nurses' right under section 7 to a free exercise of their choice concerning who would represent them in collective bargaining. This claim would focus on the nurses' state of mind and the effect of the Defendants' conduct on the nurses's decision in each local unit concerning their bargaining representative. On the other hand, the Plaintiff's claims focus on whether the Defendants' conduct violated PNA's state-law rights. The Plaintiff insists that "[r]esolution of [its] tort claims . . . can be made without reference to any claim arising under the NLRA." (Plaintiff's opposition brief at p. 21) (brackets added). Finally, noting that the Board cannot award damages, PNA asserts that to deprive an injured party of complete relief would ignore the exception from *Garmon* preemption of "interests deeply rooted in local feeling and responsibility." *Belknap, supra,* 463 U.S. at 498, 103 S.Ct. at 3177, 77 L.Ed.2d at 807.

The Plaintiff makes a similar argument in relation to section 9. It points out that section 9 protects the nurses' right to a fair election, not PNA's right to conduct its business without the fraudulent interference of its own employees and a rival union. It also emphasizes that it has not presented a section 9 claim in its complaint so that we will not be confronted with section 9 issues like whether the nurses' right to a free and fair election was hindered.

We agree with the Defendants that this position is at odds with the case law on *Garmon* preemption. To begin with, there is no blanket exception from *Garmon* preemption for state-law tort claims. The cases on which the Plaintiff relies carefully analyzed the particular state-law claims at issue to see if they would unduly interfere with the Board's administration of the NLRA before allowing them to proceed. Second, the Plaintiff's test for determining a preempted claim is erroneous. The test is not whether the state-law claim is identical to the claim that could be brought under the NLRA, "but whether the controversy presented to the

state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." *Sears, supra,* 436 U.S. at 197, 98 S.Ct. at 1757, 56 L.Ed.2d at 225. That determination is made by "looking to the factual bases of each controversy [and] examining the interests protected by each claim and the relief requested." *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1470 (5th Cir. 1993) (brackets added).

The Plaintiff's test ignores the factual bases of each controversy, and, as the Defendants point out, would always lead to a conclusion of no preemption because state-law causes of action (or "claims" as the Plaintiff puts it) are by definition not identical to unfair labor practices under the NLRA. As the Supreme Court noted in *Local 100 v. Borden*, 373 U.S. 690, 698, 83 S.Ct. 1423, 1428, 10 L.Ed.2d 638, 644 (1963), "[i]t is not the label affixed to the cause of action under state law that controls the determination" but the "'*areas of conduct* which must be free from state regulation . . . .'" (brackets added) (emphasis in original) (quoted case omitted). We do not mean to dismiss the specific factors PNA relies on in presenting its analysis, only to point out that in context they cannot carry the weight the Plaintiff places on them.

Looking to the factual issues that would be presented by both controversies, we conclude that they would be the same. The evidence the Plaintiff would use to establish its state-law claims would be the same to show that the Defendants interfered with the nurses' right to choose their own bargaining agent or to a free or fair election between unions competing to represent them. In both controversies the allegedly fraudulent and unfair conduct of the Defendants would be at issue. Since this is so, it is not sufficient that PNA is seeking to redress injury to itself rather than to the nurses. As noted, *Garmon* preemption (at least in

connection with conduct prohibited or arguably prohibited under the NLRA) focuses on conduct, not parties. Nor does it aid the Plaintiff that the Board cannot award damages. *See Garmon, supra; Hobbs v. Hawkins,* 968 F.2d 471, 478 (5th Cir. 1992). It is true that the Board's inability to award damages was a factor cited by the Supreme Court in all the cases the Plaintiff relies on (except *Sears* which dealt with an injunction) in deciding that a state-law claim was not preempted, but in those circumstances it was clear that the factual issues to be decided would not significantly interfere with the Board's authority, and the fact that the Board could not award damages was further support for the Court's conclusion that there would be no conflict with the Board

Local 926 v. Jones, 460 U.S. 669, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983), supports our decision. In *Jones*, the Court held that a supervisory worker's state-law claim against a union for intentional interference with contract, which alleged that the union caused his employer to discharge him, was preempted by the NLRA. The Court reasoned as follows:

> [A] fundamental part of such a claim is that the Union actually caused the discharge and hence was responsible for the employer's breach of contract. Of course, this same crucial element was be proved to make out a § 8(b)(1)(B) case: the discharge must be shown to be the result of Union influence. Even on Jones' view of the elements of his state-law cause of action, the federal and state claims are thus the same in a fundamental respect . . . .

Id. at 682, 103 S.Ct at 1462, 75 L.Ed.2d at 380 (brackets added). Similarly, in the instant case, the Plaintiff will be showing that PSEA and its agents caused the section 7 and 9 violations as a way of proving their state law claims. There is a sufficient risk of interference with Board authority on this fundamental factual issue to justify preemption.

We note that cases that have involved claims of fraud or other bad-faith conduct have generally ruled in favor of preemption when the conduct, as here, arose in a factual setting covered by the NLRA. *See Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654 (7th Cir. 1992). *But see Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1991). When it has not, the fraud claim has been allowed to proceed. *See E.F. Etie Sheet Metal Co., supra* (no NLRA preemption when the claim was fraud and breach of fiduciary duty in inducing employer to enter the labor agreement, not in its execution).

We therefore rule that those portions of counts II, IV, V, VI, VII, VIII, IX, X and XI that involve health-care facilities covered by the NLRA are preempted by the NLRA.

B. LMRA Preemption.

The Defendants contend that the LMRA preempts count I (claim for breach of fiduciary duty against the former PNA labor representatives) and count II (claim for fraud and deceit against the former PNA labor representatives). As the Third Circuit recently stated in *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995):

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles—necessarily uniform throughout the Nation— must be employed to resolve the dispute.

Id. at 228 (quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.ed.2d 410, 418-19 (1988)). As the Third Circuit also noted, preemption extends to both tort and contract actions. *Id.* at 229.

The Defendants argue in their supporting brief that these counts are preempted because the Plaintiff admits that its relationship with its former labor representatives was governed solely by the CBA and thus any duty of good faith or honesty would have had to have arisen from the CBA. The Defendants argue in their reply brief for the first time that these claims are preempted because their resolution would require interpretation of Article XVI, § 2 of the CBA, a provision dealing with "good and sufficient cause" to discharge an employee. They cite in their support *California Electric Co. v. Briley*, 939 F.2d 790 (9th Cir. 1991).

In opposition, the Plaintiff argues, citing *Lingle*, that its state-law claim may proceed because the CBA does not set forth the fiduciary obligations or duties the former labor representatives owed PNA, and that therefore even if the CBA controlled the relationship between the parties, its state-law claims are not preempted because they do not require an interpretation of the CBA.

We agree with the Plaintiff. It does not matter that the CBA may have controlled the relationship between PNA and its former labor representatives. The state-law claims are independent of the CBA (and therefore may proceed) in the only sense that matters for section 301 preemption, " 'resolution of the state-law claim[s] does not require construing the collective-bargaining agreement.' " *Trans Penn Wax Corp., supra,* 50 F.3d at 230 (brackets added) (quoted case omitted). *California Electric Co.* is distinguishable because resolution of the state-law claim in that case did depend on an interpretation of a clause in the CBA at issue there, identified by the Ninth Circuit as section 3.06(c). 939 F.2d at 793.

In this regard, we reject the Defendants' contention that we must interpret Article XVI, § 2 of the CBA to resolve the Plaintiff's claims. That clause has nothing to do with the

former labor representatives' duty of good faith and honesty toward their former employer. In fact, although PNA did not argue it, the Plaintiff could have contended that its former representatives' breach arose from a separate agreement concerning their employment obligations. If so, counts I and II would clearly not have been preempted. *See Trans Penn Wax Corp., supra,* 50 F.3d at 229 ("the mere existence of a collective bargaining agreement does not prevent an individual from bringing state law claims based on some independent agreement or obligation").[4]

C. Preemption of the Defamation Claim.

Because the Supreme Court specifically held in *Linn, supra,* the NLRA did not preempt a state-law defamation claim, the defendants argue separately on the preemption of count III, PNA's defamation claim. First, they argue that *Linn* is inapplicable because it dealt with defamation against an individual, not a business entity. Second, they assert that, unlike the plaintiff in *Linn*, PNA can seek redress under section 9 of the NLRA. They therefore argue that the defamation claim is preempted as well.

We reject both reasons. There is nothing in *Linn* to limit its holding to defamation against individuals. Further, the Supreme Court recognized in *Linn* that an unfair-labor-practice charge under section 8 could be pursued there but, nevertheless, decided that the defamation claim would not interfere with the Board's administration of the NLRA. The instant case is legally indistinguishable from *Linn*, and we must therefore hold that the defamation claim is not preempted.

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[4] We also reject the Defendants' contention that the Plaintiff must show that its asserted state-law right was independent and non-waivable. The Plaintiff has satisfied this criterion to the extent required by the Supreme Court since its state-law claims do not depend on a provision of the CBA. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206, 216 (1985).

D. Remand.

We will dismiss the counts in the complaint to the extent they are preempted by federal law. The remaining claims arise only under state law. We will therefore remand them to the state court. *See Trans Penn Wax Corp., supra,* 50 F.3d at 233. *See also* 28 U.S.C. § 1367(c)(3).

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: June 6, 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-94-880

PENNSYLVANIA NURSES ASSOCIATION,
Plaintiff

vs.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, DEBRA FERGUSON, RICHARD LEWIS, JEFFREY LEWIS, KAREN SCHRADER, ALFRED NELSON, JR., THOMAS FERGUSON,
Defendants

ORDER

[Filed Harrisburg, PA, JUN -6 1995
Mary E. D'Andrea, Clerk Per /s/ GTG]

AND NOW, this 6th day of June, 1995, upon consideration of Defendants' motion for judgment on the pleadings, it is ordered that:

1. The motion is granted as to counts II, IV, V, VII, VIII and IX to the extent they are based on conduct covered by the NLRA.

2. The motion is denied as to counts I, III, VI, X and XI.

3. The Clerk of Court is directed to remand this action to the Court of Common Pleas of Dauphin County, Pennsylvania, and to close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-94-880

PENNSYLVANIA NURSES ASSOCIATION,
Plaintiff

vs.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, DEBRA FERGUSON, RICHARD LEWIS, JEFFREY LEWIS, KAREN SCHRADER, ALFRED NELSON, JR., THOMAS FERGUSON,
Defendants

ORDER

[Filed Harrisburg, PA, JUL 28 1995
Mary E. D'Andrea, Clerk Per /s/ GH Deputy Clerk]

AND NOW, this 28th day of July, 1995, upon consideration of the defendants' Rule 60(a) motion for relief from order and their Rule 59(e) motion to amend, it is ordered that:

1. The Rule 59(e) motion is granted.

2. Paragraphs one and two of the order, dated June 6, 1995, are amended to read as follows:

> "1. The motion is granted as to counts II, IV, V, VI, VII, VIII, IX, X and XI to the extent they are based on conduct covered by the NLRA.
>
> 2. The motion is denied as to counts I and III."

3. In all other respects, the order remains the same.

4. The Rule 60(a) motion is dismissed.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX E

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No. 94-cv-00880

Nos. 95-7457, 95-7458 and 95-7645

Present: Sloviter, *Chief Judge,* Sarokin and Rosenn, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and were argued by counsel on May 20, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 31, 1995, be, and the same is hereby affirmed. As this Court has appellate jurisdiction, the petition for writ of mandamus is moot. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ (signature illegible)
Chief Deputy Clerk

Dated: July 25, 1996

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7457

PENNSYLVANIA NURSES ASSOCIATION

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; DEBRA FERGUSON; RICHARD LEWIS; JEFFREY LEWIS; KAREN SCHRADER; ALFRED NELSON, JR.; THOMAS FERGUSON

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and ROSEN,* *Circuit Judges*

The petition for rehearing filed by Appellant Pennsylvania Nurses Association in the above-entitled case having been submitted to the judges who participated in the decision of this court** and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ D. K. Sloviter
Chief Judge

Dated: (stamp) AUG 26 1996
by/CC: DFO, TAF, TJS, BJS, RHC

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* Hon. Max Rosenn, Senior Circuit Judge, as to panel rehearing only.

** Hon. H. Lee Sarokin heard argument but retired from office prior to the filing of the petition for rehearing.

Supreme Court, U.S.
FILED
DEC 20 1996

No. 96-808

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PENNSYLVANIA NURSES ASSOCIATION,
Petitioner,
v.
PENNSYLVANIA STATE EDUCATION ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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PARTIES

In addition to the parties identified in the caption of the case, the following individuals were parties to the proceeding in the court below: Debra Ferguson, Richard Lewis, Jeffrey Lewis, Karen Schrader, Alfred Nelson, Jr., and Thomas Ferguson. These individuals are respondents in this proceeding pursuant to Rule 12.6, and this Brief in Opposition is filed on their behalf as well as on behalf of respondent Pennsylvania State Education Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-808

PENNSYLVANIA NURSES ASSOCIATION,
Petitioner,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

Respondents Pennsylvania State Education Association ("PSEA"), *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Pennsylvania Nurses Association ("PNA"). As we explain below, the Petition should be denied because:

1. The Third Circuit reached the question as to which PNA seeks review only in connection with the alternative, and secondary, basis for its decision, and the outcome in the court below would not be changed even if that question was answered in PNA's favor (REASONS FOR DENYING THE WRIT, Part I);
2. In answering the question as to which PNA seeks review, the Third Circuit applied well-established law to the facts of this case (REASONS FOR DENYING THE WRIT, Part II); and

3. PNA does not contend that there is a conflict among the Circuits with regard to the primary basis for the Third Circuit's decision, and there is no conflict even with regard to the question as to which PNA seeks review (REASONS FOR DENYING THE WRIT, Part III).

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

In this case, PNA alleges that PSEA and the six individual respondents have committed a variety of state-law torts—Breach of Fiduciary Duty (Count I), Fraud and Deceit (Count II), Defamation (Count III), Commercial Disparagement (Count IV), Unfair Competition (Count V), Vicarious Liability (Count VI), Interference with Contractual Relations (Counts VII, VIII, and IX), Aiding and Abetting (Count X), and Conspiracy (Count XI). Because this case was decided on a motion for judgment on the pleadings, we accept as true the allegations in the Complaint and set them forth in this Statement as "facts," although many of these allegations are denied in defendants' Answer.

PNA and PSEA are both labor organizations within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, which seek to organize and represent, for purposes of collective bargaining, employees of, *inter alia*, health-care facilities in Pennsylvania and Delaware. During the period when most of the events at issue in this case took place, four of the individual respondents were employed as "labor representatives" by PNA. Subsequently they became employees of PSEA. The other two individual respondents were at all relevant times employees of PSEA.

This case has its genesis in a campaign by PSEA to replace PNA as the exclusive collective bargaining representative for nurses employed at eight health-care facilities in Pennsylvania and Delaware. Five of these facilities are

private-sector institutions, at which PNA was recognized as the exclusive representative pursuant to the NLRA, while the other three (two in Pennsylvania and one in Delaware) are public-sector institutions, at which PNA was recognized as the exclusive representative pursuant to the applicable state labor-relations statutes.

PNA's status as the exclusive collective bargaining representative at the eight health-care facilities appears to have been particularly vulnerable to "raids" by competing unions, and recognitional challenges took place in 1993 at all of these facilities (as well as at others—not involved in this case—at which PNA also was the exclusive representative). PSEA replaced PNA as the exclusive representative at four facilities, three facilities were taken over by other unions, and PNA was able to retain its status at one facility.

Although cast in the language of tort, PNA's Complaint amounts to a challenge to the campaign undertaken by PSEA to replace PNA as the exclusive collective bargaining representative at these eight health-care facilities. Thus, the Complaint alleges that four of the individual respondents, while employed by PNA, acted as agents of PSEA to persuade the members of the bargaining units for which they had responsibility to switch their support from PNA to PSEA. These employees (who subsequently became employees of PSEA) are alleged, in concert with PSEA and the other individual respondents, to have taken certain actions that facilitated PSEA's effort to replace PNA as the exclusive representative at these facilities.[1] PNA avers in its Complaint that respondents' "purpose and intent" in taking these actions was "to displace PNA

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[1] The actions allegedly taken include delaying or undermining contract negotiations so that PNA's existing collective bargaining agreements would expire without replacement; concealing the status of the contract negotiations from PNA's leadership; making false statements to bargaining unit members about the effectiveness of PNA; and generally soliciting support for PSEA.

as the exclusive bargaining agent for the nurses at [PNA's] locals."

B. Proceedings Below

PNA filed its Complaint in the Court of Common Pleas of Dauphin County, Pennsylvania, on May 14, 1994. Respondents removed the case to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1441, and subsequently moved, on preemption grounds, for judgment on the pleadings with respect to all counts in the Complaint. The district court (Hon. William W. Caldwell) granted the motion in part, denied it in part, declined to reach certain state-law issues, and—having disposed of all federal questions—remanded the remaining claims to the state court pursuant to 28 U.S.C. § 1367(c)(3). Petitioner's Appendix ("App.") A-37-54.

Applying the test of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), as more recently set out in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the district court held that Counts II, IV, V, VI, VII, VIII, IX, X and XI—to the extent that they are based on conduct at private-sector facilities governed by federal labor law—are within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"), and thus preempted by the NLRA. The court held, however, that Count III is not preempted by the NLRA, and it rejected respondents' contention that Count I (and also, as an alternative argument, Count II) is preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The court declined to rule on respondents' further contention that Counts II-XI, to the extent that they are based on conduct at public-sector facilities governed by state law, come within the exclusive jurisdiction of the Pennsylvania and Delaware administrative agencies responsible for public-sector labor relations, and are preempted by the state counterparts to the NLRA. The court instead remanded those issues to the state court.

Both sides appealed to the United States Court of Appeals for the Third Circuit, which on July 25, 1996, affirmed the district court's judgment on the federal issues in its entirety. App. A-1-21.[2] In an opinion by Chief Judge Sloviter, the court began by setting out the following framework for analysis:

> [S]tate regulations and causes of action are presumptively preempted if they concern conduct that is *actually or arguably either prohibited or protected by the Act*. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects.

App. A-8 (quoting *Belknap*, 463 U.S. at 498-99) (emphasis added by Third Circuit). Applying that framework, the court first held that the conduct of which PNA complains was "arguably prohibited" by NLRA Section 8(b)(1)(A)—which makes it an unfair labor practice for a union or its agents "to restrain or coerce . . . employees" in the exercise of their rights under NLRA Section 7 to organize and choose their own exclusive collective bargaining representative, App. A-9-10—and under NLRA Section 9, which gives the NLRB jurisdiction over the selection of exclusive representatives. App. A-10.

The court below then addressed the two well-established exceptions to the preemption doctrine. It had little difficulty in holding that the conduct in question could not be characterized as of "peripheral concern" to the NLRA,

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[2] The district court's refusal to decide the state-law preemption issues was not appealed.

inasmuch as it "involves the core activities with which the Act is concerned: union organizing and the employees' election of an exclusive bargaining representative." App. A-11. The court also held that the second exception did not apply:

> A least with regard to the nine claims which the district court found preempted (Counts II, IV, V, VI, VII, VIII, IX, X and XI), PNA has not demonstrated that any of these falls within the category of claims which the Court has determined "touch[] interests deeply rooted in local feeling and responsibility." *Belknap*, 463 U.S. at 498. Although PNA claims that "in a free market economy that places economic actors in competition with one another, the states have a substantial interest in policing the market to ensure that free competition does not degenerate into the law of the jungle," Appellant's Brief at 40, when the competition is between unions such matters are the particular concern of the NLRA. PNA has cited no authority supporting its argument that market regulation of competing labor organizations is a matter so rooted in local concern as to prevent preemption by the federal labor laws.

App. A-12.

Having concluded on the basis of the foregoing analysis that the state-law tort claims in question were preempted, the court went on to demonstrate how the same result was required under an alternative analysis. "Even were we to conclude," said the court, "that the issue presented is one of particular state concern," *id.*, the balancing test that then would be called for between that state concern and potential interference with the regulatory jurisdiction of the NLRB *also* would result in a holding that PNA's claims were preempted. *Id.* at A-12-15. In this context, the Third Circuit addressed the question, articulated in *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978), "whether the controversy presented to the state court is identical to . . .

or different from . . . that which could have been, but was not, presented to the Labor Board." App. A-13 (quoting *Sears*, 436 U.S. at 197). The court found that "[i]n the instant matter, much of the conduct forming the basis of the state tort claims also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding." App. A-13. Thus, "PNA's state claims would overlap with NLRB issues," App. A-14, and the case was therefore distinguishable from this Court's precedents in *Sears* and *Belknap*:

> In the case before us, . . . the allegations that PSEA and the individual defendants sought to undermine PNA and influence the outcome of the nurses' representation election would be the focus of both the unfair labor practice charges and PNA's state-law claims. The risk of conflicting rulings and interference with Board enforcement of national labor policy is evident.

App. A-15.

In reaching this conclusion, the Third Circuit "reject[ed] PNA's attempt to replace the well-established *Garmon* analysis with an 'identical controversy' test for preemption." *Id.*[3] Responding to PNA's contentions in this regard, the court observed that this Court repeatedly has held "that the fact that the NLRB cannot provide damages as a remedy is an insufficient reason by itself to warrant holding preemption inapplicable," *id.* at A-16 n.3 (citing *Local 926, Int'l Union of Operating Eng'rs v.*

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[3] In an effort to support its position that there is a need for clarification by this Court, PNA attributes to the Third Circuit the view "that preemption decisions of this Court 'have been somewhat unclear.'" Petition at 12 (quoting App. A-16). In point of fact, the Third Circuit was referring, without approbation, to the observation of "a respected commentator," as a predicate for its counterobservation that there was no justification for abandoning "the analytical framework of *Garmon* and *Belknap*." App. A-16.

Jones, 460 U.S. 669, 684 (1983); *Garmon*, 359 U.S. at 246-47), and that "a Board proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted." App. A-17. Accordingly, the court declined PNA's implicit invitation "to abandon more than half a century of federal policy that places exclusive jurisdiction over issues of national labor relations in the hands of the agency created by Congress to deal with them." *Id.*[4]

REASONS FOR DENYING THE WRIT

I. BECAUSE THE THIRD CIRCUIT REACHED THE QUESTION AS TO WHICH PNA SEEKS REVIEW ONLY IN CONNECTION WITH THE ALTERNATIVE, AND SECONDARY, BASIS FOR ITS DECISION, THE OUTCOME IN THE COURT BELOW WOULD NOT BE CHANGED EVEN IF THAT QUESTION WAS ANSWERED IN PNA'S FAVOR

There is no dispute about the three-prong test that this Court has established in *Garmon* and its progeny for determining when state-law claims are preempted: (1) the initial question is whether the conduct upon which the claims are based is arguably protected or prohibited by the NLRA; (2) if the answer to this question is "yes," the claims are preempted unless either of two exceptions is applicable—*i.e.*, the conduct at issue (a) is of only "peripheral concern" to federal labor law, or (b) "touches interests deeply rooted in local feeling and responsibility," *Belknap*, 463 U.S. at 498; and (3) if one of these exceptions does apply, the court then must balance the state and federal interests involved. This is the test that the

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[4] On matters that are not before this Court, the Third Circuit also affirmed the district court's holdings that (1) under *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), PNA's defamation claim is not preempted, App. A-17-19; and (2) LMRA Section 301 does not preempt Counts I and II of PNA's Complaint. App. A-19-21.

Third Circuit applied, *see* App. A-8, and it is also the test that PNA sets out in the very first paragraph of its argument to this Court. *See* Petition at 10-11.

Applying this test, the Third Circuit first held, as we noted above in the Statement of the Case, that the conduct of which PNA complains in Counts II and IV-XI is "arguably prohibited" under NLRA Sections 8 and 9. App. A-9-11. The court then concluded that PNA's claims do not fall within either the "peripheral concern" or the "local feeling and responsibility" exception. App. A-11-12.[5] With that, the Third Circuit had resolved the preemption issue before it—although the court nonetheless continued its analysis by offering an alternative route to the same result, holding that "[e]ven were we to conclude" that one of the exceptions applied, the balancing test would still result in preemption. App. A-12-15.

PNA's Petition does not call into question either of the Third Circuit's two initial conclusions. Rather, after correctly laying out the appropriate framework, PNA proceeds directly to the third prong of the test, arguing that "*in determining whether the risk of interference outweighs the state's interests,* the key inquiry or test is whether the controversy presented in court is 'identical to' or 'different

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[5] PNA's review of the Third Circuit's opinion leaves out this step of the court's analysis. After correctly noting the court's statement that "[*i*]*f* the conduct is only of 'peripheral concern' to the NLRA, or 'touches interests deeply rooted in local feeling and responsibility,' the interests of the state in controlling and remedying the conduct must be balanced against the risk of interference with the NLRB's authority to adjudicate controversies committed to it by the NLRA," Petition at 8-9 (emphasis added), the Petition continues: "Accordingly, the Third Circuit set out to ascertain whether there would be a risk of interference with the NLRB's jurisdiction if PNA's state law claims were permitted to proceed in state court." *Id.* at 9. The Petition thus skips entirely over the Third Circuit's conclusion that neither of the two exceptions applies, as well as its introductory phrase ("Even were we to conclude . . .") that makes clear the alternative context in which it reached the balancing test.

from' the controversy that could have been (but was not) presented to the NLRB." Petition at 11 (emphasis altered). PNA's entire argument is addressed to this question. The Petition, in other words, concedes the primary basis on which the Third Circuit held that its state-law tort claims are preempted, and seeks review only of the court's *alternative* holding that application of the balancing test, in any event, would result in preemption of PNA's claims.

In sum, even if the question that PNA asks this Court to review—involving the third prong of the preemption test—were to be answered in PNA's favor, that answer would not alter the decision of the court below. For this reason alone, PNA's Petition should be denied.

II. THE ALTERNATIVE, AND SECONDARY, BASIS FOR THE THIRD CIRCUIT'S DECISION REPRESENTS AN UNEXCEPTIONAL, AND FAITHFUL, APPLICATION OF WELL-ESTABLISHED LAW TO THE FACTS OF THIS CASE

The question that is raised by PNA in its Petition involves the applicability of the third prong of the preemption inquiry. Specifically, PNA contends that the Third Circuit misapplied what it terms the four-pronged "*Sears* 'identical controversy test,' " Petition at 9, when the court concluded that allowing PNA to proceed with its state-law tort claims potentially would interfere with the regulatory jurisdiction of the NLRB. Because, as indicated in Part I, a reversal of the Third Circuit in this regard would not alter its ultimate preemption holding, the question raised by PNA does not provide a basis for granting review in this case. But PNA in any event is wrong: the "identical controversy" test that it posits finds no basis in the relevant Supreme Court precedents, and the Third Circuit's decision constitutes an unexceptional, and faithful, application of the third prong of this Court's preemption test.

As explained above in the Statement of the Case and in Part I, the Third Circuit applied the preemption analysis that this Court has set out in *Garmon* and its progeny: the court first determined that the conduct upon which PNA's claims were based was "arguably prohibited" under NLRA Sections 8 and 9, and then concluded that the conduct did not fall within either the "peripheral concern" or the "local feeling and responsibility" exception. In the alternative, the court held that balancing state concerns against potential interference with the jurisdiction of the NLRB also would require preemption, because "much of the conduct forming the basis of the state tort claims also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding." App. A-13.

PNA contends that the Third Circuit erred in balancing these interests by failing to apply a four-pronged test that PNA claims to have distilled from this Court's cases. PNA offers no citation in support of this test, which, as the Third Circuit observed, appears to have been cobbled together from "a statement in *Sears* and fragments of statements from other Supreme Court cases where the Court found no preemption." App. A-15. The Third Circuit was entirely correct in refusing to apply it.

PNA nowhere takes issue with the Third Circuit's fundamental conclusion that the facts and issues to be determined in PNA's state-law tort claims and in the potential NLRA claims overlapped so significantly that these were, in essence, the same controversy. App. A-13-15. Instead, PNA argues that the court should also have taken into account the "interests to be protected" and the remedies available in each forum. Petition at 11. PNA does not explain what it means by "interests." If the reference is to the state's interest in upholding its tort law, the Third Circuit did indeed properly take account of this "interest" in its inquiry into whether the conduct at issue "touches on interests . . . deeply rooted

in local feeling and responsibility." App. A-11 (quoting *Jones*, 460 U.S. at 676). If, on the other hand, PNA's reference is to the differing legal rights protected by state tort law and the NLRA, the "interests to be protected" are by definition not the same, and, as both courts below properly recognized, the identity *vel non* of these interests could not possibly be an appropriate basis for deciding whether to allow the state-law claims to proceed:

> As the district court recognized, a Board proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted. This would require us to abandon more than a half a century of federal policy that places exclusive jurisdiction over issues of national labor relations in the hands of the agency created by Congress to deal with them.

App. A-17.

That leaves the matter of remedies, which indeed appears to be PNA's primary concern.[6] Again, PNA's emphasis on this factor is misplaced. While it is true that PNA could not obtain in an NLRB proceeding the $1.3 million in damages that it seeks in this lawsuit, that is precisely the point of federal preemption. As this Court has made clear, federal labor law determines not only what conduct is sanctionable, but also what sanctions are to be imposed for such conduct. Permitting the states to award damages far exceeding the sanction Congress has deemed appropriate for violations of federal labor law

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[6] Indeed, PNA's statement of the Question Presented focuses principally on whether an adequate remedy is available under federal labor law: "Whether the National Labor Relations Act preempts state common law tort claims filed by one labor union against another for intentional, malicious, and outrageous conduct *that caused substantial economic damages which the National Labor Relations Board does not have the authority to remedy*, simply because the conduct was arguably prohibited by the National Labor Relations Act?" Petition at i (emphasis added).

would constitute an intolerable interference with the federal scheme. *See Garmon*, 359 U.S. at 246-47; *Jones*, 460 U.S. at 684.

The Third Circuit correctly held that PNA's claims were preempted—first, because the conduct on which they were based was "arguably prohibited" under the NLRA, and because neither the "peripheral concern" nor the "local feeling" exception applied; and alternatively because, in view of the substantial overlap between the state and federal claims, the risk of interference with the regulatory jurisdiction of the NLRB outweighed the state interests involved. In both instances, the Third Circuit straightforwardly applied existing law to the facts of this case. The result it reached was correct and does not merit review by this Court.

III. PNA DOES NOT CONTEND THAT THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PRIMARY BASIS FOR THE THIRD CIRCUIT'S DECISION, AND THERE IS NO CONFLICT EVEN WITH REGARD TO THE QUESTION AS TO WHICH PNA SEEKS REVIEW

PNA asks this Court to grant review because, *inter alia*, "[t]he Third Circuit's decision in this case establishes a mature conflict concerning the formulation and application of the *Sears* 'identical controversy test.'" Petition at 17. PNA's reliance on this alleged conflict is misplaced for two independently dispositive reasons.

In deciding this case, the Third Circuit applied this Court's three-prong test for NLRA preemption. PNA does not take issue with the court's formulation of that test, and does not suggest that there is any conflict among the Circuits in this regard.

In applying the test, the court below did not find it necessary to reach the third prong in order to dispose of this case. It was able to affirm the decision of the district court by concluding that the conduct underlying PNA's

state-law tort claims arguably was prohibited by the NLRA (the first prong), and that the conduct did not come within either of the two recognized exceptions to the preemption doctrine (the second prong). *See* App. A-9-12. The Third Circuit's application of these two prongs of the preemption test to the facts of this case clearly does not present any *legal* issue as to which there is a certworthy conflict among the Circuits, and PNA does not contend otherwise.

As noted, the court below reached the third prong of the preemption test—and addressed the question of whether allowing PNA to proceed with its state-law tort claims impermissibly would infringe on the jurisdiction of the NLRB—only in connection with the analysis underlying the alternative, and secondary, basis for its decision. App. A-12-15. PNA contends that it is the correctness *vel non* of this analysis as to which there is a conflict among the Circuits.

Even if there were such a conflict (which, as we demonstrate below, there is not), this case would provide an inappropriate vehicle for resolving it, inasmuch as the challenged analysis was not necessary to the Third Circuit's primary holding. But PNA's argument fails even on its own terms: there is in fact no conflict among the Circuits with regard to the formulation and application of the third prong of this Court's preemption test.

PNA cites four cases as evidence of an alleged conflict: *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1427 (7th Cir. 1995); *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1470 (5th Cir. 1993), *cert. denied*, 510 U.S. 1117 (1994); *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1417 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993); and *Windfield v. Groen Div.*, 890 F.2d 764, 768 (5th Cir. 1989). According to PNA, the courts in these cases allowed state-law tort claims "similar to PNA's" to go forward "because the interests protected and the reme-

dies requested in both the state court and NLRB proceedings were different even though the two proceedings shared a common factual basis." Petition at 18. PNA misstates the teaching of these cases.

In each of the cases upon which PNA relies, the court found that there simply was no significant "common factual basis" between the state-law tort claims and the unfair labor practice charges that could have been, but were not, brought before the NLRB on the basis of the same underlying conduct. Indeed, in *Loewen* and *Milne*, the courts found that the conduct in question did not provide the predicate for unfair labor practice charges, and the holdings of nonpreemption rested upon the conclusion that the conduct was not even "arguably prohibited" by the NLRA. *See Loewen*, 65 F.3d at 1426 ("We find therefore that Haberichter will be unable to demonstrate that Loewen's conduct is arguably prohibited under § 8 of the NLRB [sic]."); *Milne*, 960 F.2d at 1414-16, 1417 (concluding that the conduct underlying plaintiffs' tort claims did not arguably constitute either bad-faith bargaining or direct bargaining proscribed by the NLRA).[7]

Although the conduct in question was held to be arguably prohibited in the other two cases cited by PNA, it was the lack of significant overlap in the factual underpinnings of the tort and NLRA claims that was fatal to NLRA preemption. In *Etie*, an employer asserted, *inter alia*, claims of fraud and breach of fiduciary duty against a union and a multiemployer association, alleging that the union and the association had attempted to drive the

[7] The passages from these cases to which PNA cites are dicta, in which the courts briefly noted that "even if" the conduct in question were arguably prohibited by the NLRA, they would still decline to find the state-law claims preempted. *See Loewen*, 65 F.3d at 1426-27; *Milne*, 960 F.2d at 1416-17 ("Even if we accepted defendants' argument that its alleged misrepresentations or concealment is arguably prohibited by § 8 . . . ."); *id.* at 1417-18 ("In any event, even assuming that the alleged misrepresentations arguably constituted direct bargaining . . . .").

employer out of business by forcing it to abide by an interest-arbitration provision the association had agreed to, and had enforced against the employer, without the employer's authorization. *See* 1 F.3d at 1468-69. The court found that the factual questions that would have to be decided in order to resolve the state-law tort claims were significantly different from those that would have been addressed under the NLRA. Whereas the tort claims focused on the employer's grant of authority to the association, unfair labor practice charges alleging impermissible support by an employer of a labor organization, or unlawful interference with the employees' right to choose their collective bargaining representative, would focus on the impact of the agreement entered into pursuant to the grant of authority. The latter focus, the Court opined, raised a wholly separate question that "presuppose[d] the question of power to enter the agreement at issue in the state claims" and "d[id] not answer the state law questions." *Id.* at 1470.

Similarly, in *Windfield,* where an employee brought claims based on an alleged individual contract of employment entered into during a union organizing campaign, *see* 890 F.2d at 765-66, the court found that preemption was not required simply because "some common facts may be relevant to both NLRB and state court proceedings." *Id.* at 770. Unlike the situation in *Jones, supra,* in which this Court "concluded that the proof required for [the] state law claim . . . overlapped too much with that for an unfair labor practice charge," 890 F.2d at 770, the Fifth Circuit found in *Windfield* that the factual "overlap will be tangential to the legal issues within the purview of the NLRB and state law." *Id.*

In short, in each of the four cases upon which PNA relies, preemption arguments were rejected because, on the specific facts before them, the courts concluded either that the conduct at issue was not even "arguably prohibited" under the NLRA, or that—contrary to PNA's contention—the legal issues raised by the state-law claims and the

NLRB proceedings would not have "shared a common factual basis." Petition at 18. These holdings are in no way inconsistent with the result reached by the Third Circuit in applying the third prong of the *Garmon/Belknap* preemption test to the facts of this case. Accordingly, even with regard to the question as to which PNA seeks review—which, as we have shown, is not appropriately presented by this case—there is no conflict among the Circuits that warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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